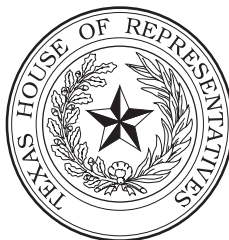


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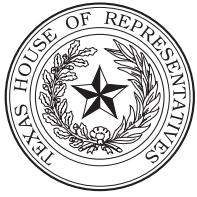
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MAJOR ISSUES OF THE 76th LEGISLATURE REGULAR SESSION

June 30, 1999



Number 76-15



HOUSE RESEARCH ORGANIZATION

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Tom Whatley, Director

June 30, 1999

Number 76-15

MAJOR ISSUES OF THE 76TH LEGISLATURE, REGULAR SESSION

During its 1999 regular session, the 76th Texas Legislature enacted 1,622 bills and adopted 17 joint resolutions after considering over 5,900 measures filed. This report provides an overview of some of the session's highlights, summarizing proposals that were approved and some that were not. Also included is a brief review of the arguments offered for and against each measure as it was debated during the session.

The measures featured in this report are a sampling and are not intended to be comprehensive. Other reports already published or being prepared by the House Research Organization examine other legislation approved by the 76th Legislature, including HB 1, the general appropriations act for fiscal 2000-2001, the bills vetoed by the governor, and the proposed constitutional amendments on the November 2, 1999, ballot.

Steering Committee:

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Elliott Naishtat
Joe Pickett

Bob Turner
Leticia Van de Putte
Steve Wolens

76TH LEGISLATURE, REGULAR SESSION

	Introduced	Enacted*	Percent Enacted
House bills	3,855	960	24.9 %
Senate bills	1,911	662	34.6 %
TOTAL bills	5,766	1,622	28.1 %
HJR s	97	11	11.3 %
SJR s	45	6	13.3 %
TOTAL joint resolutions	142	17	12.0 %

*Includes 31 vetoed bills — 24 House bills and seven Senate bills

COMPARISON OF 1997 AND 1999 REGULAR SESSIONS

	1997	1999	Percent Change
Bills filed	5,561	5,766	3.7 %
Bills enacted	1,487	1,622	9.1 %
Bills vetoed	36	31	- 13.9 %
JRs filed	166	142	- 14.5 %
JRs adopted	15	17	13.3 %
Legislation sent or transferred to Calendars Committee	1,387	1,198	- 13.6 %
Legislation sent to Local and Consent Calendars Committee	986	1,299	31.7 %

Source: Texas Legislative Information System (TLIS)

House Research Organization

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Allowing Texas to join the Southern Dairy Compact

HB 2000 by B. Turner, et al.

Died in Senate committee

HB 2000 would have authorized Texas to join the Southern Dairy Compact, which would establish a regional system of price regulation over Class I milk. The bill would have declared the compact's regulatory authority over the Class I milk market in Texas and other southern states and would have reserved the authority to replace the federal market-order pricing system for all classes of milk with the Southern Dairy Compact Commission's own authority to regulate the marketplace if the federal system was discontinued.

HB 2000 would have required the agriculture commissioner or a designee to serve as the chair of Texas' five-member delegation to the Southern Dairy Compact Commission or to appoint an employee of the Texas Department of Agriculture to serve as the chair. The governor would have appointed the other four delegates, who would have represented the dairy industry and consumers.

Supporters said HB 2000 would empower the governor to enter Texas in the Southern Dairy Compact, enabling Texas dairy producers to reap the benefits of the compact that 14 other Southern states already have joined. Southern states acting in concert in forming an interstate commission to set minimum prices would sustain the viability of dairy farming in the South and help assure consumers of an adequate local supply of milk. If Texas producers cannot participate in the compact, they will continue to experience declining milk prices under the federal government's market-order pricing system. The compact would implement a minimum-price system for fluid milk in the compact region. This would stabilize milk prices, because the price of fluid milk is much more consistent than that of other classes of milk. If the Legislature chooses to wait two more years before joining the compact, Texas will have lost many more dairy farmers and much of the state's milk-production capacity.

Opponents said Texas' entry into the Southern Dairy Compact would result in dairy processors paying higher prices to milk producers. This price increase ultimately would be passed on to the consumer, raising milk prices at the grocery store. Price increases also could hurt school lunch programs and hospitals. Congress passed the Freedom to Farm Act with the intention of phasing out government involvement with farm prices. Creating a regional compact simply would add another barrier to reaching a free market system, which would be the best long-term solution.

The **HRO analysis** appeared in Part One of the April 19 *Daily Floor Report*.

Cost-sharing program for boll weevil eradication

SB 448 by Duncan, et al.

Effective May 20, 1999

SB 448 creates a cost-sharing program between the Texas Department of Agriculture (TDA) and the Texas Boll Weevil Eradication Foundation aimed at eradicating the boll weevil and the pink bollworm. The cost-sharing program will be administered under rules adopted by the agriculture commissioner and allows the commissioner to contract with the foundation for eradication services. TDA may spend money only in active eradication zones or in those zones where boll weevil eradication has been declared complete by the U.S. Department of Agriculture. HB 1 by Junell, the general appropriations act for fiscal 2000-01, allocates \$25 million to TDA for the cost-sharing program each year of the biennium, and matching funds also may be applied to this program.

Supporters said Texas cotton farmers have faced several years of drought conditions, low yields, low prices, and high production costs. On top of all this, they have had to battle the boll weevil and other pests. Three cotton-growing regions in the state are participating in the foundation program, while several other regions that are among the largest producing areas have voted to participate if the state shares the costs. State cost sharing would lower the per-acre cost assessment for every cotton farmer in each active region. Cotton farmers desperately need this monetary help to continue farming and to become more competitive.

Other states have reached or nearly reached eradication and are producing cotton at lower costs than Texas. Cotton is Texas' leading cash crop, generating more than \$1.6 billion annually, and Texas is the nation's leading cotton-producing state. With a cost-sharing partnership in place, Texas cotton farmers should see lower production costs and lower pesticide application amounts over the long run. This should enable them to produce cotton more economically and to remain competitive with other states.

Opponents said investing state money through a cost-sharing program would not ensure that Texas could eradicate the boll weevil. The Texas Boll Weevil Eradication Foundation regions still would have to come up with other funding sources. Banks and lending institutions are aware of the possibility that a region could default on loans, because that happened in the Rio Grande Valley region in 1996, and they may be very leery of making loans for eradication uses.

The **HRO analysis** appeared in the April 29 *Daily Floor Report*.

Farm and Ranch Recovery Act

SB 705 by Ogden
Died in conference committee

SB 705 would have established a Commodity Crisis Council, an Agri-Tech Program, an agricultural technology account in the general revenue fund, and an Emergency Hay Program to help farmers, ranchers, and scientists cope with and find solutions to drought, hay, and forage shortages, low commodity prices, and other agricultural crises. The bill would have expanded from a pilot project to statewide the Financial and Risk Management Assistance (FARM Assist) program advising agricultural producers on long-term financial planning. It also would have allowed state employees who are volunteer firefighters to leave work to fight fires in a federally declared disaster or drought area. As amended on the House floor, SB 705 also would have entered Texas into the Southern Dairy Compact, upon ratification by Congress (see HB 2000).

Supporters said SB 705 would help farmers and ranchers survive agricultural crises by creating state programs to conduct research on the problems they face, by implementing crisis management measures, and by educating more agricultural producers on financial planning. The Emergency Hay Program would establish a hotline to help coordinate resources by connecting hay buyers and sellers. The research promoted by the Agri-Tech Program would be crucial to finding technological solutions to agricultural crises that face Texas producers. The Commodity Crisis Council would be charged with devising a state plan to address recurring drought. Statewide expansion of the FARM Assist program would educate many more farmers on risk management and long-term strategic planning.

Opponents said Texas farmers may well need emergency relief, but the scope of issues addressed by SB 705 would be too broad. The bill would define an agricultural crisis as nearly anything bad that could happen to agriculture. The Agri-Tech studies should not be conducted by the state but by private industry, when necessitated by sufficient demand. No other industry receives as much help from government as agriculture does, and this bill proposes even more. The federal government has been moving the agriculture industry toward the free market and away from government subsidies in the past few years, and the state should not thwart these efforts with even more government programs targeted to agricultural producers.

The **HRO analysis** appeared in Part One of the May 23 *Daily Floor Report*.

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Civil immunity for employer job references

HB 341 by McCall, et al.

Effective September 1, 1999

HB 341 grants immunity from civil liability to an employer who discloses information about a current or former employee to a prospective employer. The immunity does not apply if it is proven by clear and convincing evidence that the employer had known the information to be false at the time it was disclosed or made the disclosure with malice or reckless disregard for whether the information was true or false. “Known” means that the employer had actual knowledge based on information relating to the employee, including any information the employer maintained in a file on the employee. The immunity applies to a managerial employee or a person authorized by the employer to provide information about current or former employees.

The law explicitly authorizes an employer to disclose to a prospective employer, upon request, information about a current or former employee’s job performance. It does not require an employer to provide an employment reference. The law prohibits disclosing information about a licensed nurse or licensed vocational nurse that originates from a peer review of the nurse’s performance. A nurse may submit a statement justifying the exclusion of the information.

Supporters said the bill would make employers feel more comfortable about providing truthful employment references. Employers fear civil lawsuits, most commonly on the grounds of defamation, brought by employees who feel that the employer unfairly characterized the employee’s performance or neglected to disclose beneficial information about the employee’s performance. Everyone would benefit from greater exchange of information.

Opponents said HB 341 would be an unnecessary extension of rights already granted to employers. Current common law grants an employer immunity for making a good-faith effort to provide a truthful reference. Also, truth is an absolute defense to claims of defamation. The bill’s definition of “known” is too vague since it would be difficult to prove what someone did or did not know.

The **HRO analysis** appeared in the April 14 *Daily Floor Report*.

Exempting legal self-help materials from law practice definition

HB 1507 by Wolens
Effective June 19, 1999

HB 1507 exempts from the definition of the practice of law the design, creation, publication, distribution, display, or sale — including through an Internet web site — of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that they are not a substitute for the advice of an attorney. It does not authorize the use of products or similar media in violation of Government Code, chapter 83, prohibiting the unauthorized practice of law.

Supporters said that attempts to ban legal self-help materials are restrictions on speech based on content and violate the First Amendment. Those bans would have been struck down by the courts if the Legislature did not act first. Self-help legal materials provide an inexpensive way for people to learn more about the law. The high cost of hiring an attorney keeps many citizens from learning about and protecting their legal rights. Furthermore, many issues that people face are relatively simple and do not justify the expense of hiring an attorney.

Similar laws protecting the rights of producers and distributors of legal self-help materials already have been enacted in Colorado, Florida, Indiana, Michigan, New York, and Oregon. Texas is rapidly becoming a high-technology center and would not benefit from becoming known as a state where legal self-help software and books are banned.

Opponents said some computer programs now feature “cyber lawyers,” interactive videos of lawyers — or actors portraying lawyers — who can ask the user technical questions and give legal opinions based on specific issues presented by the user. When they evaluate facts presented by a consumer and give legal opinions based on these facts, cyber lawyers should be held to the same license requirements as live, licensed attorneys. A cyber lawyer programmed or portrayed by a non-lawyer or a lawyer without a Texas license should not be allowed to give legal advice in Texas.

While self-help materials prepared by the largest and most successful publishers might be accurate, there is no guarantee that inaccurate and harmful legal advice would not be offered by smaller publishers or others who entered the market once all restrictions were removed. General materials developed for nationwide distribution might not reflect important differences in Texas law, and consumers might not be aware of this.

The **HRO analysis** appeared in Part Two of the April 19 *Daily Floor Report*.

Limiting liability for Year 2000 computer-date failures

SB 598 by Duncan, et al.

Generally effective May 20, 1999

SB 598 establishes prerequisites for bringing an action in court based on a year 2000 (Y2K) date failure and limits the liability of manufacturers and sellers of computer products when certain conditions, such as notice and offer of a correction, are met. The bill creates an affirmative defense to liability if:

- notice was given to a claimant;
- the claimant was offered a cure or correction for the Y2K failure; and
- the cure would have prevented the harm caused by the failure.

If the Department of Information Resources' (DIR) Y2K website and toll-free telephone number established by the bill provided access to information from which a person could get the information required to be included in the notice, it creates a rebuttable presumption that notice had been delivered.

In any action based on the alleged falsity or misleading nature of a Y2K statement or warranty, SB 598 creates an affirmative defense to liability when the defendant reasonably relied on the Y2K readiness statement or warranty of an independent, upstream manufacturer or seller. Damages are prohibited for mental anguish, loss of consortium or of companionship, exemplary or punitive damages, treble damages under the Deceptive Trade Practices Act (DTPA), or unforeseeable consequential damages. Damage limitations apply only if the defendant shows a good-faith effort to cure the possible Y2K problem. Exemplary damages or DTPA treble damages may be awarded if the defendant acted with fraud or malice.

SB 598 does not apply to actions based on death, bodily injury, or workers' compensation cases. It does not apply to an action enforcing the terms of a written agreement that specifically provides for liability or damages for a Y2K failure.

SB 598 requires a cause of action based on a computer-date failure to be brought within two years of the date when the failure first caused the harm. It also requires the action to be brought within 15 years after the date of sale by the defendant. These limitations apply to actions brought on or after September 1, 1999. To bring an action, a plaintiff must provide 60 days' advance notice to a defendant. If the 60-day notice requirement would prevent an action from commencing because of the statutes of limitations or repose, the claimant must provide notice no less than 31 days after bringing the action. DIR must establish a website and toll-free telephone number that allows for

the posting of information about Y2K computer-date information. The Internet address for the website is *www.dir.state.tx.us/y2k*.

Supporters said the Y2K problem potentially could lead to an economic catastrophe if many computer systems are unable process the change in date to January 1, 2000. While only a few months remain before that date, it is essential that the Texas Legislature act now rather than wait until after the damage is done. SB 598 attempts to limit the harm caused by Y2K by providing incentives for the prompt correction of potential problems. The incentives are framed in the context of the civil liability system because many people have been reluctant either to offer cures or to install cures that are offered because they hope to preserve rights in the civil justice system. SB 598 is designed to promote solutions to Y2K problems, to encourage a prompt resolution of disputes, and to discourage unbridled litigation in pursuit of “jackpot” verdicts when solutions fail.

SB 598 creates an incentive for potential defendants to post cures on the Y2K website and toll-free telephone number by giving them an affirmative defense to liability if they do so. The notice must give the potential claimant an opportunity to implement the cure without costing that claimant more than the reasonable costs for the cure. Current law and procedure are inadequate for the efficient and fair resolution of most Y2K disputes. Y2K problems present many unique legal issues and policy considerations not addressed under current law. Consumers and suppliers alike would benefit from a more predictable, specific law designed to meet those objectives.

Opponents said SB 598 and other Y2K liability legislation protects procrastinators in the computer industry from liability for a problem that they have known about for years. They have failed to make corrections, even in many products released during the past five years. This legislation penalizes responsible business people who have spent a great deal of time and money addressing the problem. It rewards irresponsible business people who have ignored it and now look to the government to bail them out. The bill also fails to address the problems of people who bought their computer products before 1985.

SB 598 places an unfair burden on consumers and small businesses, who would have to solve their own Y2K issues, while manufacturers and vendors of these defective products could escape virtually all responsibility. SB 598 could be used to limit damages or suits against companies providing Y2K remediation. These companies should not have their liabilities limited under a bill designed to promote resolution of Y2K problems.

The **HRO analysis** appeared in Part One of the April 29 *Daily Floor Report*.

SB 614 would have allowed a jury to assign a portion of the liability in a case based on negligence or product liability to a third party who could not be joined feasibly into the lawsuit. Responsible third parties would have included the claimant's employer who could not be joined due to workers' compensation insurance coverage laws or a person accused of performing a criminal act that caused or contributed to causing harm that resulted in damages. A defendant who sought to have a responsible third party assessed part of the liability would have had to file notice of that intention and to allege sufficient facts to justify the inclusion of that third party.

Supporters said defendants in many tort cases often are made to pay for the actions of third parties that may not be joined into the lawsuit because of workers' compensation laws or because their identity is unknown. These third parties may be responsible for a significant portion of the harm caused to the claimant, but since a jury cannot assess these parties' liability, the other defendants who can be sued or joined bear the liability for the responsible parties. SB 614 would allow juries to consider the liability of two particular types of responsible third parties and reassess the proportions of liability accordingly. While some claimants would have their damage awards reduced by not being able to recover from these third parties, there is no reason why innocent defendants should have to pay for the liability of others.

Opponents said SB 614 would allow defendants to shift a significant portion of the liability for a plaintiff's claim onto the shoulders of a third party that was not in the lawsuit. Because that party could not be joined, the other defendants could allege that such a third party was entirely responsible for the harm caused to the plaintiff. Because the plaintiff would be unable to recover from these third parties, the plaintiff would be forced to defend their actions in an attempt to limit their share of responsibility or else lose all or a significant portion of the claim when liability was assessed to these third parties.

Notes. The motion to suspend the Senate's regular order of business to consider SB 614 failed to receive the necessary two-thirds of those present and voting.

Limiting lawsuits against gun and ammunition manufacturers

SB 717 by Lindsay, et al.

Effective September 1, 1999

SB 717 prohibits a governmental unit, including a city, county, or other political subdivision of the state, from bringing a suit against a manufacturer, trade association, or seller of firearms or ammunition resulting from the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public, unless the Legislature approves the suit in advance. The attorney general may bring an action on behalf of the state or another governmental unit.

A governmental unit may bring a cause of action against a firearms manufacturer, trade association, or seller for specified causes such as breach of contract or warranty or injunctive relief to enforce a valid ordinance, statute, or regulation.

Supporters said counties or cities in several states have sued manufacturers of firearms and ammunition hoping to win “tobacco settlement-like” windfall verdicts worth billions of dollars. These products are legal to sell and possess, but some governmental entities are attempting to blame these products for the ills of society. These suits are based on novel and untested theories of law. If the Legislature failed to address these suits, they could impair substantially Texans’ constitutional right to bear arms.

The Legislature and not the court system should develop policy for dealing with lawful products. If left unchecked, such lawsuits could damage other lawful industries. Auto manufacturers could be sued for the costs associated with auto accidents, traffic control, and highways. Alcohol producers could be sued for costs of drunk driving and treatment of cirrhosis of the liver, and beef producers could be sued for heart-disease costs.

Opponents said SB 717 would take away the legal rights of governmental units, particularly cities and counties, to recover the enormous costs attributable to gun violence, including health care, police, and jails. The bill would protect one special interest at the expense of local governments. The state should not interfere with local discretion to bring such suits if locally elected officials believe they are justified. Lawsuits against gun manufacturers could force gun makers to increase the safety features on guns or to stop the manufacture of guns that are used primarily to commit crimes.

The **HRO analysis** appeared in the May 17 *Daily Floor Report*.

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*SB 50/*SB23/			
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Life without parole for capital murder

HB 77 by Gallego, Naishtat, McClendon
Died in House Committee

HB 77 would have required capital felons sentenced to life in prison to serve life without the possibility of parole.

Supporters said that in capital murder cases, judges and juries are limited to choosing between death and a life sentence that carries with it the possibility of parole, not always acceptable alternatives. Allowing a sentence of life without parole would give courts maximum flexibility in deciding punishments and would allow the death penalty to be reserved for the most heinous cases, while ensuring that other criminals lived the rest of their lives in prison. Life without parole would fit well in the state's court-tested punishment scheme for the death penalty. Even though the current parole rate is low, it has been as high as 79 percent, and some inmates have had death sentences commuted to life in prison and then been paroled. The Texas Department of Criminal Justice has the expertise and resources to manage a prison population sentenced to life without parole. Resources would be better used to house dangerous capital murderers permanently rather than to pursue the death penalty and respond to a lengthy appeals process.

Opponents said the wide spectrum of punishments already available to Texas judges and juries works to punish offenders adequately and protect the public. Current punishment schemes already effectively provide the option of life without parole, since capital murderers given life sentences must serve 40 years before being eligible for parole. In addition, capital felons may be paroled only with the approval of two-thirds of the 18-member Board of Pardons and Paroles, an unlikely scenario given today's tough parole policies. The procedures used in Texas to determine punishment in capital murder cases have been well litigated, and modifications to current law would be subjected to court scrutiny. Managing inmates without being able to use parole as an incentive for good behavior would be difficult and expensive. In the end, life without parole inappropriately could replace the death penalty if judges and juries consistently sentenced capital felons to life without parole. Life without parole clearly would be inadequate punishment for the most heinous crimes.

Notes: Other bills in the 76th Legislature that would have instituted a sentence of life without parole included HB 135 by McClendon and Garcia, HB 151 by Naishtat, HB 172 by Garcia, HB 1619 by Dutton, and SB 38 by Lucio, et al., all of which died in committee. For more information on this issue, see HRO Focus Report Number 75-24, *Life Without Parole: A New Punishment Option?*, August 10, 1998.

Board of Pardons and Paroles procedures in clemency cases

HB 397 by Naishtat

Died in House committee

HB 397, as proposed by a House Corrections Committee substitute, would have required the Board of Pardons and Paroles to keep records of the reasons for its actions when making decisions about clemency. In performing clemency matters, the board would have been required to comply with the Open Meetings Act and to act as a body. Board hearings and meetings on capital cases could not have been held by conference call. The board would have had to provide to an inmate sentenced to death, or the inmate's representative, a copy of any information provided to the board in a clemency matter concerning the inmate, regardless of whether the information was confidential. The board would have had to adopt rules for providing clemency information in a timely manner as well as for the manner in which issues relating to clemency were investigated.

Supporters said that although Texas' clemency procedures may meet the minimum constitutional requirements, in matters of life or death the state should not be satisfied with minimum procedural safeguards. HB 397 would ensure that state upholds the democratic principles of fairness, openness, and meaningful due process of law by requiring the board to act as a body and to keep records of the reasons for its clemency decisions. HB 397 would help end lengthy, costly, and repeated court challenges to these procedures. By making the process more open and fair, it could address some of the concerns raised by courts. The board's discretionary decision-making authority would not be affected, but the board would be held to the same standards as other state boards and would have to keep records of the reasons for its actions, a requirement already in the Texas Constitution. HB 397 would not slow the imposition of the death penalty nor result in new trials or appeals because the issues examined in each situation are different. The bill would not require public hearings, only public meetings.

Opponents said there is no compelling reason to change Texas' clemency procedures, which repeatedly have been upheld by courts as meeting all constitutional requirements. The Open Meetings Act should not apply to the Board of Pardons and Paroles, which is a unique body unlike any state agency. Furthermore, there is no constitutional right to clemency. HB 397 could cause unnecessary delays in imposing the death penalty by providing an improper forum for another "trial" of the case, a function that would be inappropriate for the board. Requiring the board to hold public meetings could open the door first to claims of a right to a public hearing, then to a right to clemency. In addition, infractions of the open meetings requirements could be used to try to challenge a decision of the board.

Enhanced criminal penalties and civil damages for hate crimes

HB 938 by Thompson, et al.

Died in Senate committee

HB 938 would have enhanced criminal penalties and allowed civil damages for crimes motivated by bias or prejudice toward a group, including a group identified by race, color, disability, religion, national origin or ancestry, age, status as a pregnant person, gender, or sexual preference. For offenses against the person (Title 5, Penal Code), arson, criminal mischief, or graffiti, the penalty would have been enhanced if at the punishment stage of the trial, the court found by a preponderance of the evidence that the defendant was motivated by bias or prejudice against a group, including one of the identified groups. It would have been immaterial that a defendant incorrectly perceived a person to be a member of one of the identified groups.

If requested by a prosecuting attorney, the attorney general could have assisted in the investigation or prosecution of such crimes. The governor's criminal justice division would have been required to provide grants to help counties with fewer than 50,000 residents prosecute such crimes under certain conditions. The bill also would have required specialized training for peace officers in the investigation and documentation of such crimes.

The bill would have established a right to be free from acts of violence against members of the identified groups and allowed civil actions and court-issued protective orders in cases where individuals were harmed or threatened by such crimes.

Supporters said the brutal dragging and murder of James Byrd Jr. of Jasper has focused national attention on hate crimes in Texas. HB 938 would address the rising level of crime motivated by hatred by providing more prosecutorial and investigative tools to crime fighters. Requirements for special training in identifying and investigating hate crimes would better prepare law enforcement officers to deal with such crimes. The protections would apply to every Texan. The bill would pass constitutional muster, as it contains no conflicts with free speech and equal protection provisions. Also, by creating enhanced penalties for property crimes, HB 938 would deter the escalation from property crimes to offenses against persons. Allowing protective orders and civil penalties also would help prevent and deter hate crimes. Incidents based on sexual preference represent the second highest category of hate crimes, and the bill would bring balance to the judicial system that has provided lighter sentences for such incidents.

Opponents said HB 938 would violate the equal protection section of the Texas Constitution, Art. 1, sec. 3, which states that all Texans have equal rights, and no person or group is entitled to separate privileges. The bill would establish a special right for a

class or group not available to all Texans. This also would protect special classes of people to the exclusion of others in violation of the equal protection clause of the U.S. Constitution. The categories the bill would create were not narrowly tailored to serve a compelling state interest, as should have been the standard. The government may not regulate speech based on hostility, and the desire to communicate to certain groups that the state does not condone “group hatred” or bias-motivated speech does not justify selectively silencing speech on the basis of content.

The **HRO analysis** appeared in Part One of the April 26 *Daily Floor Report*.

Criminal background checks for firearm sales at gun shows

HB 1199 by Danburg, et al.

Died in House committee

HB 1199, as proposed by a House Corrections Committee substitute, would have established a third-degree felony for knowingly selling a firearm to another person at a gun show without complying with the national instant criminal background check system. It also would have been a Class A misdemeanor offense for a gun show promoter, with criminal negligence, to permit sales of firearms at a gun show without compliance with the national background check system. Both offenses would have had exceptions for firearms sold to a person with a license to carry a concealed handgun or to a peace officer. It also would have been a Class A misdemeanor for a gun show promoter to fail to conduct an instant criminal background check on any person who purchased a firearm at a gun show operated by the promoter from a person who was not a federally licensed firearms dealer.

Only a licensed firearm dealer could have planned, promoted, or operated a gun show. At least 30 days before a gun show was to be held, the show's promoter would have had to provide written notice of the date, time, and place of the show to local law enforcement agencies. Violations would have been Class A misdemeanors.

Supporters said HB 1199 would close a loophole in current law requiring background checks when guns are purchased from licensed firearms dealers in stores, but not requiring background checks when guns are purchased from unlicensed dealers at gun shows. The bill could make it more difficult for criminals or minors to obtain firearms because they often seek them at gun shows to avoid background checks. All persons buying guns commercially should be subject to the same background checks, no matter where they make their purchases.

Opponents said HB 1199 is unnecessary. Problems with the illegal trafficking of firearms at gun shows could be handled by police crackdowns, as well as by the enforcement of current laws making it illegal to sell handguns to minors or to felons within five years of the date felons were released from confinement, probation, or parole. HB 1199 would be an overreaction to a nonexistent problem, since police already keep close watch over gun shows.

Detention of juveniles accused of involvement with firearms

HB 1269 by Goodman, et al.

Effective September 1, 1999

HB 1269 requires local juvenile probation departments to detain a juvenile until released by a juvenile court judge, substitute judge, or juvenile referee or until a detention hearing is held if the juvenile is taken into custody for delinquent conduct and alleged to have used, possessed, or exhibited a firearm. Juveniles may be detained in county jails or other facilities if certain conditions are met, including the lack of an available certified juvenile detention facility or secure detention facility in the county where the child is taken into custody and separation of the child from adults in the facility. Detention hearings for children held in county jails or other facilities must be held within 24 hours.

Supporters said that when a juvenile is accused of a crime involving a firearm, a judge should decide whether to detain or release the youth during the short period before the required detention hearing. HB 1269 would send a message to youths that illegal use of firearms has serious consequences. Currently, juvenile suspects can be held in custody before a detention hearing only if they meet certain criteria, such as being likely to abscond, being a danger to the public, or not having suitable supervision. HB 1269 would require holding juveniles only during the brief time between when they are taken into custody and when a judge decides to release them or a detention hearing is held, usually within two days. Judges are accountable to the public and should be involved in all decisions relating to releasing youths involved with firearms. HB 1269 would not be a burden on counties since judges could make a release decision before a hearing and juveniles could be held in county jails or other facilities.

Opponents said that requiring all juveniles accused of firearm offenses to be detained, no matter what the circumstances, arbitrarily would limit the discretion of local juvenile departments. Current law, allowing juveniles to be held before their detention hearing if they threaten public safety, gives local departments the proper justification and enough leeway to confine any dangerous youths accused of firearm violations. HB 1269 fails to recognize instances in which detaining a juvenile could be inappropriate. For example, a youth who handles a gun that another youth has brought along on an outing could be accused of unlawful carrying of a weapon, even though no violent incident occurred and the youth did not know that a gun would be present. In other cases, it could be appropriate to release a youth accused of a firearm offense if space were needed to house other juveniles accused of serious, violent offenses. HB 1269 could be costly for counties if they were required to hold juveniles whom they otherwise would have released.

The **HRO analysis** appeared in the March 16 *Daily Floor Report*.

Creating a statewide database of gang information

SB 8 by West, et al.

Effective September 1, 1999

SB 8 expands the current authorization for local law enforcement agencies to keep information on criminal combinations to allow the agencies to compile information on criminal street gangs. Law enforcement agencies that compile this information must send it to the Department of Public Safety (DPS), which must establish a statewide database by September 1, 2000. In the database, DPS must distinguish information relating to children from that relating to adults. SB 8 establishes criteria for submitting information to the databases.

Information must be removed from the database after three years if it relates to an adult who has not been arrested during that time. Information on children must be removed after two years if the child has not been arrested or taken into custody for delinquent conduct. Upon request by persons about whom information was collected, agencies must review the information and determine whether there is reasonable suspicion that the information is accurate and whether it complies with the statutory submission criteria. If the information does not meet these requirements, it must be destroyed. Persons may seek judicial review of decisions not to destroy the information.

Supporters said SB 8 would increase the effectiveness of a valuable tool already used by law enforcement authorities to combat gang activity and to solve gang-related crimes. Street gangs are becoming more mobile and organized, and they have increasing contact with prison gangs. Current law hampers law enforcement by allowing information to be shared only on a regional level. If law enforcement authorities are to combat gang crimes effectively, they must share information statewide, and the database must include all jurisdictions keeping these records. SB 8 would allow information to be collected on “criminal street gangs” as well as “criminal combinations” to eliminate current constraints on monitoring of criminal gang activities. The bill would allow database information to be used only to investigate and prosecute criminal activity and not for other reasons, such as background checks for jobs or credit checks.

This bill would not infringe on anyone’s right to free association. The mere fact that a person was a friend of a gang member would not qualify that person for entry into the database, because SB 8 would require that at least two of the objective criteria in the bill be met before information on an individual could be included. SB 8 would require the removal of information after a reasonable period if persons had not been arrested. Also, persons could challenge information about themselves and could have judicial review of any decision concerning their challenge.

Opponents said SB 8 would further erode Texans’ right to privacy. One important

reason that gang information thus far has been limited to being kept on a local or regional level is to accommodate rights to privacy and freedom of association. For example, a police officer could conclude in error that a juvenile was a gang member because the juvenile regularly played basketball with acquaintances, one of whom was a “known gang member.” The juvenile might not be a gang member at all, or he might be a gang member who had not taken up a life of crime.

The statewide database could include unfairly the names of persons who never had been arrested for a crime. The database could include anyone “reasonably suspected” of criminal activity simply because an informant considered reliable had identified the person as a gang member and because the person frequented a gang’s area, associated with gang members, and wore the clothes and tattoos of a gang.

Other opponents said the bill should allow city councils or commissioners courts to decide whether to send information to the statewide database. This would ensure that the public was aware of the decision to include citizens in the database and would give them the opportunity to voice their opinions.

Notes. The 76th Legislature enacted other gang-related legislation. **SB 1576** by West, et al. requires that when prison inmates who have been identified as gang members are released, the Texas Department of Criminal Justice (TDCJ) must notify the sheriff of the county and the police chief of the city in which the inmate will be released. **SB 1577** by West, et al. requires TDCJ to provide specialized training for parole officers who supervise parolees who have been identified as gang members.

SB 1578 by West, et al. requires the attorney general to establish an electronic gang resource system to give criminal justice and juvenile justice agencies information about criminal street gangs. The system cannot contain information about specific offenders, but can include information on gang names, colors, tattoos, migration patterns, and recruitment activities. **SB 1580** by West, et al. establishes the Texas Violent Gang Task Force, composed of representatives of state agencies and local law enforcement or probation personnel, to enable law enforcement and correctional agencies to coordinate tracking of gang activity.

The **HRO analysis** of SB 8 appeared in the May 17 *Daily Floor Report*. The analysis of SB 1578 appeared in Part Two of the May 20 *Daily Floor Report*.

Civil commitment of sexually violent predators

SB 365 by Brown/SB 29 by Shapiro, et al.

Effective September 1, 1999

SB 365, the Texas Department of Criminal Justice (TDCJ) sunset bill, includes provisions that allow certain repeat sex offenders released from a prison or a state mental health facility to be committed through the civil courts to outpatient treatment and supervision. The law authorizes the civil commitment of sexually violent predators, defined as repeat sexually violent offenders who suffer from a behavioral abnormality that makes them likely to engage in a predatory act of sexual violence. It establishes a team to evaluate sex offenders for potential civil commitment. A special division of the prison prosecution unit will represent the state and handle civil commitment proceedings. Persons considered for civil commitment will have the right to counsel from TDCJ's Office of State Council for Offenders.

If a judge or jury finds that a person is a sexually violent predator, the judge must commit the person for outpatient treatment and supervision to be coordinated by a case manager employed by the Interagency Council on Sex Offender Treatment. The supervision and treatment must continue until the person no longer is considered likely to engage in a predatory act of sexual violence. Supervision must include tracking services. The state must pay up to \$1,600 for the cost of a civil commitment proceeding, including the costs of appointed counsel and experts and of outpatient treatment and supervision.

Judges must conduct biennial reviews of committed persons, who may petition the court for release at any time. Petitions also may be filed upon recommendation by the person's case manager. Failure to comply with a commitment requirement is a third-degree felony, punishable by two to 10 years in prison and an optional fine of up to \$10,000.

Supporters said SB 365 would be an effective way to monitor, supervise, and treat sexually violent predators while they are in the community, thereby improving public safety more cost-effectively than by committing these offenders to inpatient treatment. Even with long prison terms, expanded treatment, and low parole rates, some sexual predators who have not completed treatment successfully will be released from prison or mental health facilities and should be under constant supervision until they complete treatment.

Under SB 365, the commitment, treatment, and supervision of sexual predators would occur through laws and procedures separate from those for mental health commitments. Persons with mental illness would not be stigmatized by association with criminal sexual predators because SB 365 would not use the mental health system or its resources.

Committing a sexually violent predator to outpatient treatment and supervision would not violate offenders' state or federal constitutional rights. SB 365 would be less restrictive than the Kansas law allowing inpatient civil commitment, which the U.S. Supreme Court upheld in 1997 in *Kansas v. Hendricks*, 117 S.Ct. 2072. SB 365 would ensure that a person being considered for civil commitment would have all necessary rights, including the provision of an attorney, a jury trial on demand, and the ability to appeal.

SB 365 would require assessment and screening of potential candidates to ensure that only offenders who were likely to reoffend would be channeled through the civil commitment process. It would protect persons committed to treatment by allowing them to file a release petition at any time and by requiring the case manager to authorize a petition if the person's situation had changed.

Opponents said harsh penalties for repeat sex offenses, beefed-up laws requiring the registration of sex offenders, and existing authority to commit mentally ill people involuntarily for treatment are better ways of protecting the public than enacting a new civil commitment law. Singling out classes of people who can be confined against their will would be unwise and could lead to an ever-expanding list of those who would qualify for civil commitment. The availability of civil commitment could give the public a false sense of security because many potentially dangerous offenders still would be released into society without being committed to outpatient treatment.

The cost of long-term supervision and treatment of civilly committed sex offenders, coupled with litigation, would be prohibitive. The state's resources would be better spent and public safety better enhanced by providing effective treatment for the thousands of sex offenders in prison. The cost of civil commitment would continue to escalate as more offenders were subjected to supervision and treatment and few, if any, were released.

Civil commitment would amount to little more than an "end run" around civil rights laws by using a civil forum to increase a criminal's punishment unfairly. It is not certain that a Texas civil commitment law would pass constitutional muster simply because the U.S. Supreme Court upheld the Kansas law.

Notes: SB 29 by Shapiro, which would have allowed civil commitment of sexually violent predators, passed the Senate on May 6 but died on the House calendar. The provisions of SB 29 were added to SB 365 in conference committee.

The **HRO analysis** of SB 29 appeared in the May 24 *Daily Floor Report*. For more information on this issue, see HRO Focus Report Number 76-8, *Civil Commitment of Sex Offenders*, March 16, 1999.

Family violence legislation

SB 50, SB 23, HB 2124, HB 577, HB 1411, HB 819

Effective September 1, 1999

The 76th Legislature enacted several bills dealing with family violence.

SB 50 by Nelson, et al. extends from one year to two years the maximum period for which family violence protective orders may be in effect. **SB 23** by Nelson, et al. extends from 31 to 61 days the length of time that emergency protective orders in family violence or stalking cases may be in effect. It also sets 31 days as the minimum time the order may be in effect.

HB 2124 by Cuellar requires a magistrate to issue an emergency protective order when a defendant appears before the magistrate after an arrest for a family violence offense involving serious bodily injury to the victim or the use or exhibition of a deadly weapon during the commission of an assault. In such cases, the magistrate may suspend a defendant's license to carry a concealed handgun. If a person has been found to have committed family violence, a court may use a protective order to suspend a license to carry a concealed handgun.

HB 577 by Giddings extends from 24 to 48 hours the maximum period that someone arrested or held without warrant for prevention of family violence can be held after bail has been posted and after the initial four-hour period. For the detention period to exceed 24 hours, the magistrate must conclude that there is probable cause to believe that the person committed the offense and that, within the previous 10 years, the person had been arrested for one or more family violence offenses or for any other offense in which a deadly weapon was used or exhibited.

HB 1411 by Naishtat prohibits, unless specified conditions are met, courts from allowing parents access to children if it has been shown that there is a history of family violence during the two years before the filing of a suit to affect a parent-child relationship or while such a suit is pending. HB 1411 also declares it the state's policy to provide a safe and nonviolent environment for a child.

HB 819 by Naishtat allows a party to a divorce proceeding or a child custody suit to file a written objection to court-ordered mediation if the person had been a victim of family violence. The suit may not be referred to mediation unless, on request of the other party, the court holds a hearing and determines that a preponderance of the evidence does not support the objection.

Supporters said these bills would provide needed protections to individuals threatened by family violence. Judges would retain flexibility to craft protective orders and to handle cases according to the particular requirements of a case. Family violence is a serious problem in Texas, and the law should be expanded to protect victims adequately. The Department of Public Safety reported 181,773 incidents of family violence in 1997, one-third more than in 1991. Family violence accounts for nearly one-quarter of all violent crimes in Texas.

These bills would help defuse potentially volatile family-violence situations. Several of the bills would give victims more time to make arrangements for their safety. Current law often does not allow enough time for victims to arrange other housing, secure civil protections, make transportation or day-care arrangements, or obtain social services. Allowing courts to suspend concealed-handgun licenses of family violence perpetrators subject to protective orders would help make family violence victims safer.

HB 1411 would help protect children by reducing their exposure to violence. HB 819 would prevent a batterer from using the mediation process as unfair leverage.

Opponents said these bills would go too far and some would place unreasonable restraints on the liberty of persons, including some who are only *accused* of crimes. The Legislature should not continue to craft a specific set of laws and procedures for persons accused of one type of crime. Also, many of these bills would limit judicial discretion to handle family violence cases. It would be unfair to subject persons accused or convicted of family violence to special rules for suspending concealed-handgun licenses.

HB 1411 is unnecessary because courts already have discretion to consider the commission of family violence when deciding custody or visitation rights. The use of mediation should not be limited as proposed by HB 819 because mediation can be useful for resolving disputes outside of the formalities of a full court proceeding.

The **HRO analysis** of SB 50 appeared in Part Three of the May 20 *Daily Floor Report*. The analysis of SB 23 appeared in Part Two of the May 20 *Daily Floor Report*. The analysis of HB 2124 appeared in Part Two of the May 6 *Daily Floor Report*. The analysis of HB 1411 and HB 819 appeared in the April 14 *Daily Floor Report*. The analysis of HB 577 appeared in Part Two of the April 28 *Daily Floor Report*.

Injury to a pregnant woman

SB 188 by Ogden, Lucio
Died in the House

SB 188 would have made it a third-degree felony under the assault statute to cause bodily injury to a pregnant woman intentionally, knowingly, or recklessly. The bill would have made it an offense under aggravated assault to cause bodily injury to a pregnant woman that caused a miscarriage or stillbirth. It would have been an affirmative defense to prosecution for both offenses that the conduct was an abortion performed in accordance with the Medical Practice Act. It would have been a second-degree felony under intoxication assault if a person operating an aircraft, watercraft, or motor vehicle while intoxicated caused bodily injury to a pregnant woman resulting in a miscarriage or stillbirth. SB 188 would have created a civil cause of action making persons liable for damages if they caused a pregnant woman to suffer bodily injury resulting in a miscarriage or stillbirth due to a wrongful or negligent act or omission. Courts could have awarded compensatory and exemplary damages. The cause of action would not have applied to an abortion performed in accordance with the Medical Practice Act, and either the mother or the father of the fetus could have brought the action.

Supporters said SB 188 would close a gap in current law by giving protection to pregnant women who suffer a loss due to a wrongful act of another. Currently, if a pregnant woman is assaulted, a criminal prosecution can be brought only for assault to the woman. Other acts, such as running a red light and causing a pregnant woman to have a miscarriage, can be handled only for their effect on the woman. Also, civil damages can be recovered only for the woman's injuries. SB 188 would give pregnant women additional protections just as the state provides for other groups of vulnerable persons, such as elderly people and children. SB 188 would not affect in any way a woman's right to an abortion. Thirty-eight states and the District of Columbia allow civil remedies for wrongful acts that result in a miscarriage or stillbirth, and 26 states have criminal laws dealing with the situation.

Opponents said SB 188 could establish a statutory foundation to restrict a woman's right to an abortion. The bill could result in a fetus being elevated to the legal status of personhood, resulting in a back-door approach to restrict women's access to abortion. Also, SB 188 unwisely would give pregnant women a more protected legal status than other women. When the Penal Code was revised in 1993, the Legislature decided not to prescribe varied treatment of victims subject to similar harm. SB 188 proposes a major change by enhancing the penalty for assault from a misdemeanor to a felony. The broad gap between felony and misdemeanor punishments should not be bridged solely on the basis of the victim's status.

Prohibiting death penalty for mentally retarded

SB 326 by Ellis, et al.

Died in House Calendars Committee

SB 326 would have prohibited a court from imposing a death sentence on a mentally retarded defendant found guilty of a capital offense. If a court found that a person was mentally retarded at the time of the offense and the person was convicted, the court would have had to impose a sentence of life in prison. The burden of proof would have been on the defendant to prove that the defendant was mentally retarded at the time the offense was committed. Defendants with intelligence quotients of 65 or less would have been presumed to be mentally retarded. The state would have been able to offer evidence to rebut the presumption of mental retardation or the defendant's claim.

Supporters said justice is not served when the state executes a mentally retarded person. The death penalty should be reserved as a punishment for those who clearly can comprehend why they are going to die. Texas should follow the lead of 12 other states and the federal government in banning the execution of persons with mental retardation. The "safeguards" provided in current law to prohibit the execution of the incompetent do not always work. Since 1976, Texas has executed five mentally retarded individuals. SB 326 still would allow mentally retarded persons found guilty of committing capital murder to be punished appropriately by life in prison. The rebuttal presumption prohibiting the execution of those with IQ scores of 65 or less would ensure that the law applied to those who clearly were mentally retarded and would allow prosecutors to challenge the presumption. Other cases would be decided on a case-by-case basis. It is unlikely that someone could fake mental retardation or that their level of retardation would fluctuate. Mental retardation is determined by a multi-pronged test, and SB 326 would require qualified, experienced experts to examine defendants.

Opponents said SB 326 is unnecessary because Texas law already has several safeguards to protect defendants with mental impairments who lack the mental capacity to understand the consequences of their crimes. Courts can declare someone incompetent to stand trial, or a defendant may be found not guilty by reason of insanity. In addition, juries can consider mental retardation as a mitigating circumstance when imposing a sentence. Decisions should continue to be made on a case-by-case basis by courts and juries. The issue that should be considered is whether or not a defendant understands right from wrong, not an IQ score. It would be unwise and unfair to define mental retardation with an IQ number because it could lead to a situation where someone just one point higher could be executed. Defendants could fake their level of mental retardation to save their lives. SB 326 would just add another appeal avenue to the already lengthy death sentence appeals process.

Defining illegal gambling and amusement machines

SB 970 by Sibley

Died in House Calendars Committee

SB 970 would have created a new definition of a “bona fide amusement device” that, if played for something of value other than money, would have been legal. A bona fide amusement device would have been defined as an amusement game for which skill was the predominant requirement to win a thing of value, which could not have been cash, a cash equivalent, or redeemable for cash. The monetary value of such an item awarded from a single play could not have exceeded \$5. An exception to this rule would have allowed bona fide amusement devices on the premises of a licensed gaming venue to award items of value that could have been redeemable for game cards or tickets.

Licensed gaming venues would have meant premises that were licensed or permitted for the on-premises consumption of alcohol and that were licensed to conduct bingo or parimutuel wagering or to sell lottery tickets. Game cards would have been defined as bingo cards for play on the premises where the device was located. Tickets would have been defined as parimutuel tickets redeemable at a racetrack where the device was located.

“Bona fide amusement device” would not have included:

- devices that employed an inherent, material element of chance to affect whether a player would win or be awarded a thing of value and that were designed to be pre-set in a way that limited the overall percentage of the consideration paid by players that would be awarded as prizes; or
- electronic, electromechanical, or mechanical contrivances that for a consideration afforded the player an opportunity to obtain anything of value, the award of which was determined solely or partially by chance, even though accompanied by some skill, whether or not the prize was paid automatically by the contrivance.

Gaming devices used in gaming conducted by some Texas Indian tribes and devices owned or possessed by the tribes in conjunction with that gaming would have been considered gambling devices only if so defined under the law as it existed on January 1, 1999.

Supporters said SB 970 would close loopholes that have allowed electronic gambling to proliferate under the cover of a law intended only to legalize amusement games with no significant payoff. SB 970 would draw a bright line between legal and illegal machines so that law enforcement authorities and prosecutors could combat illegal gambling machines and the public could continue to enjoy legal amusement games.

Problems have arisen for law enforcement officers because current law is vague and it can be difficult to determine if a machine, such as an “eight-liner,” sometimes is used to award prizes in excess of the legal limit. SB 970 would prohibit amusement machines from awarding cash and would require them to be based on skill with no big payoff. True gambling machines would be prohibited. SB 970 would define these machines clearly based on their capabilities and features so that manufacturers of the machines could not simply change the way a machine looked and call it legal.

Allowing amusement machines in racetracks and other gaming venues would give Texans more entertainment options and allow these places to diversify. SB 970 would be fair to Indian tribes by not affecting machines that were not considered gambling devices on January 1, 1999.

Opponents said current law outlawing gambling devices and defining legal amusement machines is adequate to control gambling. If illegal games are proliferating, enforcement and prosecution should be stepped up. SB 970 could outlaw many harmless amusement machines such as “eight-liners,” unfairly helping large, well-established businesses such as amusement parks and national-chain restaurants at the expense of small venues such as VFW halls, bowling alleys, or stores. The criteria used to decide whether a machine is legal should relate to the prize and not to the inner workings or technical aspects of machines. SB 970 would do little to clarify the law and could complicate the issue further. The bill would base the definition of a gambling machine on the subjective standard of having skill as the predominant requirement to win. It would be better to define skill or to institute some other non-subjective test.

It would be unwise to allow amusement machines at bingo halls, parimutuel racetracks, and lottery retailers to award players with betting tickets or bingo cards because the tickets or cards could be used to win large amounts of cash. SB 970 also could result in expanded Indian gaming by explicitly allowing gambling machines operated by some tribes.

For additional information, see HRO Focus Report Number 76-4, *A Fuzzy Issue: Are Eight-Liners Amusement or Gambling?*, February 2, 1999.

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Texas courthouse preservation program

HB 1341 by Gallego, et al.
Effective September 1, 1999

HB 1341 creates the Texas courthouse preservation program. A county that owns a historic courthouse may apply to the Texas Historical Commission (THC) for a grant or loan for a historic courthouse project. A grant may not exceed the greater of \$4 million or 2 percent of the biennial appropriation for the historic preservation program. A county must develop a master preservation plan for the project and use recognized preservation standards. Biennial appropriations to the THC for program administration and oversight may not exceed the greater of \$2 million or 1 percent of the biennial appropriation for the program. HB 1 by Junell, the general appropriations act for fiscal 2000-01, includes \$50 million for the Texas courthouse preservation program.

Supporters said HB 1341 would help counties preserve the state's local historical heritage. Historic Texas courthouses not only serve as county administrative centers but can promote economic development. Picturesque local courthouses have become popular locations for major films, television movies, and commercials. They also attract cultural and heritage tourists, who generally spend more time and money than purely leisure travelers. All 225 historic Texas courthouses have made the National Trust for Historic Places list of the most endangered places in the United States, and almost all are in need of repairs. Most were built with thick walls to retain coolness and conserve heat and with large open spaces to allow good air circulation, making them more economical to operate than many modern buildings.

Opponents said HB 1341 represents the wrong priority for Texas. Instead of spending state dollars on old buildings, the Legislature should appropriate money for its people. Public and higher education, health care, environmental protection, and other needs have a higher claim on state spending than restoring courthouses. Such projects more appropriately should be financed by private donations and local funding rather than by state dollars. Restoring county courthouses could far exceed the cost of starting over with a new building, and while historical preservation is important, restoring buildings that have deteriorated over the years makes little economic sense.

The **HRO analysis** appeared in Part Two of the April 19 *Daily Floor Report*.

Implementing and taxing interstate branch banking

HB 2066, 2067 by Marchant

Generally effective May 29, 1999, and January 1, 2000

HB 2066 permits interstate branch banking in conformity with federal law. An out-of-state corporation may enter the Texas market by acquiring an existing branch or bank, merging banks or bank holding companies, or establishing *de novo* branches. The law retains Texas' policy that a bank or bank holding company may not hold more than 20 percent of deposits in the state and may not acquire a bank that has not been operating for at least five years. The deposit concentration provision also applies to intrastate acquisitions. An out-of-state bank may establish a *de novo* branch in Texas if the laws of its home state would permit a Texas bank to establish a *de novo* branch there.

The law's "super parity" provision allows a Texas bank to perform an act, own property, or offer a product or service that is permitted for any domestic depository institution by any state or federal law. However, super parity may not be used to circumvent certain state laws, including those regarding branching limitations, the sale of insurance products, interest rate restrictions, fiduciary obligations, and consumer protection. The banking commissioner has regulatory authority over banks' intentions to use super parity and may prohibit a bank from exercising this power if specific authority for it did not exist, if federal law preempted its use, or if it would adversely affect the soundness of the bank.

HB 2066 also allows interstate expansion for trust companies. An out-of-state trust company may conduct business in Texas at an office other than a bank branch, under rules to be issued by the banking commissioner. These trust companies are subject to the franchise tax and to minimum capital and other regulatory standards applicable to state trust companies. In a manner similar to banks, the bill establishes a *de novo* reciprocity policy, and acquisitions of Texas trust companies are subject to requirements that are similar to those for banks.

The law broadens requirements that all out-of-state financial institutions register with the secretary of state, who must qualify them to do business in Texas. It allows state banks and other domestic institutions to designate a registered agent to expedite the service of process. The law establishes a fee schedule for these designations. It allows a Texas bank to act as an agent for another depository institution without regard to whether the Texas bank was an affiliate or otherwise related to the other institution. It also authorizes the deposit of state, school district, local government, and other public funds with branches of banks located in Texas, as well as with banks domiciled here.

HB 2066 expands the authority of the banking commissioner to coordinate and share information with other states' bank supervisory and regulatory entities to regulate

branches of out-of-state banks. These powers are consistent with the commissioner's current authority over institutions domiciled in Texas.

Although HB 2066 as a whole took effect May 29, 1999, most of its provisions take effect September 1, 1999.

HB 2067 subjects branches of out-of-state banks and savings and loan associations to the state franchise tax. It expands the definitions of "banking corporation" and "savings and loan association" to include any such institution organized under the laws of Texas or another state, under federal law, or under another country's laws.

Supporters of HB 2066 said the banking industry in Texas needs legislative action to set the parameters for branch banking because the federal government has preempted the state's opt-out legislation that was intended to prohibit interstate branching here. Texas has lost a court challenge of the preemption and now must change state law to reflect the new interstate banking environment. HB 2066 would provide a framework for interstate branch banking that was acceptable to all interested parties and would preserve the attractiveness of a state charter while implementing federal requirements for interstate branching.

Supporters of HB 2067 said it would require all banks and savings and loan associations doing business in Texas to pay their fair share of franchise taxes. Without HB 2067, banks domiciled in other states would have an unfair competitive advantage over those domiciled in Texas, because current law allows out-of-state banks to avoid paying taxes in Texas.

Neither HB 2066 nor HB 2067 encountered significant opposition.

The **HRO analysis** of HB 2066 appeared in Part One of the April 28 *Daily Floor Report*. The analysis of HB 2067 appeared in Part Two of the April 19 *Daily Floor Report*.

Expanded uses of economic development sales tax revenue

HB 3029 by Oliveira, et al.

Effective September 1, 1999

HB 3029 expands uses of the Development Corporation Act by including targeted infrastructure and improvements to promote new and expanded business development, job creation and retention, job training, and educational facilities among projects eligible to use funding from a local economic development sales tax. The bill defines the powers and governing structure of a public corporation established to administer a spaceport project, which is eligible to use development corporation sales-tax revenue.

If a city holds an election in which voters approve the implementation of a sales tax for economic development, the economic development corporation is exempt from paying property taxes. A corporation in a city that has not held such an election is not exempt from paying property taxes, regardless of when the corporation was organized.

Supporters said HB 3029 would clarify that a city with an economic development sales tax may use the revenue for additional projects, such as job creation and training. This would help communities provide additional incentives to attract new businesses and retain existing businesses.

HB 3029 also would increase the chances that a Texas county would be designated as a spaceport site. For Texas to compete with Florida and California for this industry, the public and private sector must show interest in the project as other states have done.

Opponents said including job training as an eligible project could disadvantage businesses in cities that have adopted an economic development sales tax, because those businesses could be less likely to obtain assistance through the Smart Jobs Fund and Skills Development Fund.

HB 3029 would expand the Development Corporation Act far beyond its original intent by including provisions for a multimillion-dollar spaceport project. The economic development sales tax in counties vying for this designation should be used for more general projects authorized under existing law.

The **HRO analysis** appeared in Part Two of the May 3 *Daily Floor Report*.

Revising the Smart Jobs program

HB 3657 by Oliveira, et al.
Effective September 1, 1999

HB 3657 extends the Smart Jobs program through December 31, 2001, establishes a rainy day fund for the program for use during economic downturns, and directs new funding to the Skills Development Fund. The Smart Jobs program will award grants for the creation and retention of jobs that pay at least 100 percent of the average weekly wage in the county and that are covered by a group health insurance plan for which the employer pays at least 50 percent of the premiums or other charges. Money from the Smart Jobs fund is to be spent in all areas of the state in approximate proportion to each region's share of the state population, civilian labor force, unemployed, and submission of grant applications for qualified jobs. At least 20 percent of the grants must be awarded to employers who relocate to the state. Businesses may not apply both for a Smart Jobs program grant and to a college for a Skills Development Fund grant unless the business and the college file an application for concurrent participation in both programs.

Supporters said HB 3657 would fine-tune the Smart Jobs program, which allows Texas to improve the competitive position of businesses and workers in the global marketplace by helping to upgrade the skills of skilled, well-paid workers. The bill would help the border region by requiring that Smart Jobs money be spent in all areas of the state in proportion to each region's share of the state's population, civilian labor force, unemployed, and qualified jobs.

The rainy day fund would help stabilize fluctuations in the unemployment insurance (UI) fund. Because the Smart Jobs program depends on revenues from the UI fund, Smart Jobs funding would suffer in times of high unemployment. The rainy day fund would allow the state to take advantage of Texas' healthy economic climate.

Opponents said the Smart Jobs program would not target workers who need training the most. Many areas of Texas lack workers with even basic skills who would qualify for the types of existing jobs necessary to attract Smart Jobs training funds. The state should direct more funding toward workers who need less specialized skills to get entry-level jobs. The Smart Jobs program funds customized training for particular businesses, which already spend a great deal of their own money to train and retrain employees to keep pace with competitors. The state should not spend public money when the direct benefit goes only to the individual companies who receive the grants.

The **HRO analysis** appeared in Part Two of the April 21 *Daily Floor Report*.

Financing for 2007 Pan American Games and 2012 Olympics

SB 456 by Madla, et al.

Effective August 30, 1999

SB 456 creates a Pan American Games trust fund and an Olympic Games trust fund, to be used only to fulfill joint obligations of the state and a municipality to a site selection organization under a contract to support the games. The maximum amounts for the funds are \$20 million for the Pan Am Games and \$100 million for the Olympics. The Comptroller's Office must establish and administer the funds. It also must determine the incremental tax revenue generated by the selection of a Texas city as a host city for either of the games. The comptroller is charged with depositing the incremental municipal and state taxes generated as a result of the games into the fund beginning with the first measurable economic impact after the selection of the city. The state portion of the fund would be 86 percent, with the city portion covering the remaining 14 percent. Disbursements from the fund could be made only after the comptroller certified that disbursement was required by the games support contract. Any money remaining in the fund after the respective games would be remitted to the state and the municipality. A municipality must hold an election, if time permits, on a uniform election date to endorse the use of a portion of its sales and use taxes to support the fund.

SB 456 imposes ethics requirements on the local organizing committee, including disclosure of financial interests, disclosure of each contribution and each expenditure, and submission of financial statements. The bill establishes an offense of bribery for intentionally or knowingly offering, conferring, soliciting, or accepting any benefit for the recipient's decision, opinion, recommendation, or vote as a member of an organizing committee or site selection organization. This would not apply to meals and entertainment reported under the bill's expenditure requirements.

Supporters said San Antonio, Houston, and Dallas are preparing bids to host either the 2007 Pan American Games or the 2012 Olympics, and all three cities have a good chance of being selected. For a city to receive the award, however, the state must create a fund to cover any possible losses by the site selection organization that may result from hosting the games. SB 456 would allow the creation and funding of the trust funds with tax revenue directly attributable to the games, which should be more than sufficient to meet the required amount. It is very unlikely that there would be any losses related to hosting the games, so the fund revenue eventually would go back to the state and the city.

Opponents said this bill would allow state and municipal tax revenues to be pledged against losses to the Pan Am Games and Olympic Games. Sales tax revenues are the primary method of financing many state and local functions. This legislation would dedicate a substantial portion of that revenue, setting it aside for several years to

guarantee against the losses of the international games organizations for choosing Texas cities to host their games. This revenue dedication could impair the state or cities' ability to provide funding for needed services.

The **HRO analysis** appeared in Part Two of the May 19 *Daily Floor Report*.

Amending constitutional provisions for reverse mortgages

SJR 12 by Carona, et al.

Effective if approved by voters on November 2, 1999

SJR 12 would amend constitutional provisions authorizing reverse mortgage home equity loans. With a reverse mortgage, the borrower receives regular payments from the lender based on the equity built up in the borrower's homestead. Repayments do not begin until the homeowner no longer owns or occupies the homestead. Specifically, SJR 12 would, if approved by voters at the November 2, 1999, election:

- increase the minimum eligibility age to 62 from 55 years;
- establish that regular installment payments could be reduced at the request of the borrower;
- allow lenders to pay directly taxes, insurance, repairs, assessments levied against the property, and any lien with priority over the reverse mortgage, if the borrower failed to pay them;
- extend the time that the borrowers must cease occupying property before repayment begins to 12 months from 180 days and eliminate the requirement that the homestead owner's location be unknown to the lender;
- require the lender to provide the borrower 30 days to remedy conditions creating grounds for foreclosure; and
- stipulate that a court order was needed to foreclose for any reason other than the death of the borrowers or the sale or transfer of the property.

Supporters said SJR 12 would give elderly homeowners in Texas the opportunity to supplement their monthly income with equity they have built up in their homestead and would reinforce strong constitutional protections against foreclosure. The provisions of the 1997 home-equity constitutional amendment did not provide sufficient legal certainties to cause a market for reverse mortgages to develop in Texas. As a result, no reverse mortgages have been issued in Texas. SJR 12 would harmonize state laws with federal rules and guidelines to allow older Texans to use the equity in the homes to provide a means of support.

This proposed amendment would establish a more complete framework to develop reverse mortgages and would balance successfully the needs of senior citizens and the interests of lenders. It would add substantial consumer protections to help avoid foreclosure on those who continue to reside in the homestead. SJR 12 would protect elderly Texans from being forced to sell or vacate their homes because of technicalities, unforeseen circumstances, sudden expenses, or oversights. It also would enable lenders to step in when needed to protect their security interests by being authorized to pay taxes, insurance, maintenance and repairs, assessments, and any other liens on the property in

addition to any regular installments.

Opponents said the Constitution should specify that the payments made by the lender should be made out to the borrower only, except in cases when the lender needs to make direct payments to cover taxes, insurance, repairs and maintenance, assessments, or priority liens. This would reduce the likelihood that seniors would be duped into giving their equity away to another person or company.

Other opponents said the proposed amendment would create reverse mortgages that would be unnecessarily restrictive. Texas ought to allow homeowners to establish lines of credit in addition to, or in lieu of, lump-sum or periodic payments. Borrowers in other states can do this, and it makes reverse mortgages more attractive to borrowers and lenders alike. A borrower should have the flexibility to adjust installments up or down as needed and ought to be able to request a lump-sum payment of the remaining amount at any time, as in other states.

The **HRO analysis** appeared in the May 18 *Daily Floor Report*.

Elections

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Campaign reporting requirements

HB 4 by Gallego, et al.
Died in the Senate

HB 4, as passed by the House, would have required candidates and officeholders for statewide office, state senator, state representative, State Board of Education, and court of appeals justice to establish a single principal political committee through which all contributions and expenditures would have been funneled. It would have created a civil penalty of \$4,000 for accepting prohibited contributions or making prohibited expenditures from personal funds. It would have required candidates to disclose their contributors' occupations and employers and to describe the property or services contributed by in-kind contributors. If the donation was unsolicited, the candidate would have had 30 days to request identifying information from the contributor. General-purpose committees that accepted political contributions over \$5,000 during the last days of a campaign would have had to report the contribution 48 hours after accepting it. Individuals or committees, other than a state or county political party, making a direct campaign expenditure of more than \$5,000 during the last days of a campaign would have been required to file a report with the Ethics Commission within 24 hours.

The bill would have changed the definition of a pledge and required pledges over \$1,000 or 10 percent or more of the anticipated cost of a campaign to be reported. The report would have had to include the name of each person making an offer, the intent, if the offer was accepted, whether or not it was received, and how much it was.

Corporations or labor organizations would have to have reported expenditures over \$100 to finance the establishment or administration of a general-purpose committee or to finance the solicitation of political contributions to a general-purpose committee from employees or stockholders of a corporation. The bill would have raised to \$100 from \$50 the threshold for reporting individual political contributions, expenditures, and loans.

Supporters said HB 4 would revise and enhance the current campaign reporting laws. It would create a reporting system that would allow citizens to be fully informed about the funding of political campaigns and how candidates were spending their contributions.

A good reporting system should require disclosure both from those who give and those who receive political contributions to ensure the accuracy of the information submitted. Fuller disclosure would highlight patterns of special-interest giving and identify concentrations of donations by certain groups or individuals and their employers.

Requiring individuals or political committees who make large direct campaign

expenditures during the last 10 days of a campaign to report those expenditures within 24 hours would go a long way toward informing citizens about who is backing whom. The public should have this information available before the election rather than after. Campaign fund-raising would be centralized under one principal political committee so that contributions and expenditures could be identified and tracked more easily. The bill would simplify the reporting process and the monitoring of campaign finance for candidates, TEC, and concerned citizens alike.

Administrative and solicitation expenditures made by corporations and labor organizations currently are not reportable. Having this information would highlight which corporations and unions were infusing money into the political system. Raising the \$50 threshold on reporting of contributions and expenditures to \$100 would lessen the administrative burden of having to report small contributions. Requiring the description of in-kind contributions and expenditures would enhance disclosure and clarify that pledges or offers would be reported even if the pledge was not received, allowing candidates to create a more accurate financial report.

Opponents said HB 4 would impose too many burdensome requirements for candidates and officeholders by requiring additional identifying information about contributors. It is not clear what public good would be served by identifying a contributor's employer.

Other opponents said that the proposed civil penalty of \$4,000 for knowingly accepting illegal contributions or making a contribution or expenditure from personal funds was too low. A better solution would be to make the civil penalty proportionate to the amount of the prohibited contribution or expenditure.

Current law limits the use of campaign contributions to repay personal wealth loaned to the candidate's campaign. However, a candidate's use of political contributions to repay a bank loan for which the candidate is personally liable does not count toward the limits on reimbursement, and the bill does not address this issue at all. HB 4 also does not address the issue of out-of-state political action committee activity, for which Texas needs clear reporting guidelines. Out-of-state PACs need to be held to the same disclosure standard as Texas-based PACs.

The **HRO analysis** appeared in the May 12 *Daily Floor Report*.

Electronic campaign-finance reporting

HB 2611 by Greenberg, Gallego, et al.
Effective September 1, 1999

HB 2611 requires candidates for statewide office, state senator, state representative, the State Board of Education, or a district office filled by voters of more than one county, including courts of appeal, officeholders, and political committees that are required to file campaign finance reports with the Texas Ethics Commission (TEC) to file the reports electronically. Those who do not use computers to keep current contribution and expenditure records are exempt from the electronic filing requirement if they file with each report an affidavit stating their exemption. Multi-county district or statutory county judges and district attorneys also are exempt. Candidates, officeholders, or political committees whose contributions and expenditures do not exceed \$20,000 in a calendar year are exempt, but this exemption does not apply to statewide candidates and officeholders or specific-purpose committees supporting or opposing them.

Those required to file electronically must do so by computer modem, computer diskette, or the Internet, using software supplied free by TEC or other software that meets commission specifications. Persons filing reports must specify to TEC which format they will use.

TEC must post a report on the Internet no later than the second business day after the report is filed. However, if every candidate for a particular office or every political committee supporting or opposing a candidate for an office has not filed a report by the reporting deadline, TEC may not post reports on the Internet until everyone has filed, or no later than the 21st day after the report filing deadline, whichever comes first. For reports due eight days before an election, TEC must post the reports by the fourth day after that filing deadline. Before making the reports available on the Internet, TEC must remove a contributor's address, except for the city, state, and zip code.

Persons filing electronic reports may use publicly accessible computers that have Internet access and web browser software. State agencies, cities, counties, independent school districts, and public libraries must allow the use of their computers for this purpose but are not required to furnish supplies. Officeholders may not use their official computers to file reports electronically.

Supporters said HB 2611 would enable Texas voters to know who is contributing money in the political process and how it is being spent. Without prompt and accurate information, voters who wish to make more informed choices find it almost impossible to figure out who is backing a certain candidate. Posting campaign financial reports on the Internet would enable Texans to observe campaign spending right up until an election. If

voters wanted to know what special-interest groups were backing a given candidate, they could obtain this information before the election. Electronic filing would not place a burden on less well-funded candidates or on those who were not computer-literate because candidates who did not use computers in their campaigns would be exempt, as would those who collected or spent less than \$20,000 per year, unless they were statewide candidates, officeholders, or committees.

Posting reports on the Internet would be delayed only if all candidates or committees had not filed in a timely fashion. Posting campaign reports simultaneously only after all candidates for a particular race had filed would ensure that no candidate had an advantage over another. Regardless of whether the reports were posted on the Internet two days after they were filed or 21 days after the filing deadline, they would be available on the Internet before an election.

Opponents said that choosing a software program that could meet everybody's needs would be very difficult. Some grassroots candidates likely would find it difficult to comply with the electronic filing requirement. The program software would have to include searchable features and be easy to use for everyone who had to file electronically.

Preventing TEC from posting any campaign reports until all of the reports were filed or 21 days after the filing deadline would create a significant delay in getting information to the public. The electronic reporting deadline should apply to everyone under all circumstances, and for those who violated the law, there should be a penalty.

The **HRO analysis** appeared in the May 3 *Daily Floor Report*.

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Public participation in environmental permitting procedures

HB 801 by Uher, et al.

Effective September 1, 1999

HB 801 adds certain restrictions to the contested case hearing process for environmental permit applications. The Texas Natural Resource Conservation Commission (TNRCC) may not refer an issue to the State Office of Administrative Hearings (SOAH) unless the issue involves a disputed question of fact, is raised during a public comment period, and is relevant to the application decision. If TNRCC grants a contested case hearing, it must limit the scope and number of issues referred to SOAH and must specify the maximum expected length of the hearing. HB 801 also eliminates vague statutory language stipulating that requests for contested case hearings must be “reasonable” and supported by “competent evidence.”

HB 801 provides earlier notice and expanded public meeting-and-comment periods for water quality, solid and hazardous waste, and injection well permits, as well as for applications for confined animal-feeding operations proposed to be located in certain watersheds or near public water supply systems. The bill neither expands nor restricts the kinds of permits that are subject to public notice, comment, or contested case hearings, with one exception. Contested case hearings no longer are required for renewal of certain hazardous waste storage and processing permits as long as the waste is generated on site. HB 801 requires additional notice and expanded public comment for contested air permits but leaves in place current statutory provisions that allow TNRCC’s executive director to approve air permits for which hearings are not requested. It also requires TNRCC to prescribe alternative methods by which small businesses may publish notice of applications for air permits as long as there is no significant effect on air quality.

Supporters said HB 801 was the result of negotiation by industry, local governments, and public interest and environmental groups. It would balance various competing interests by shortening the contested case hearing process and making it more predictable for permit applicants while preserving opportunities for citizens affected by permit proposals to request hearings. Earlier notice and public comment periods would encourage permit applicants and those affected by permits to discuss permits early in the process so problems could be solved without the need for contested case hearings.

Opponents said that although HB 801 would remove the opportunity for contested case hearings for only limited kinds of permit renewals, the bill could be the first of a series of incremental steps to scale back the right to have a contested case hearing.

The **HRO analysis** appeared in the April 26 *Daily Floor Report*.

Managing and disposing of low-level radioactive waste

HB 1910/HB 1171 by Chisum

Died in the Senate/Died in the House

HB 1910, as passed by the House, would have given the Texas Low-Level Radioactive Waste Disposal Authority jurisdiction over site selection, operation, and decommissioning of a disposal or assured isolation site for low-level radioactive waste. The authority could have contracted with a private entity to build and operate the site. The bill would have granted the Texas Department of Health (TDH) the sole authority to issue a license for an assured isolation site. The assured isolation method stores waste in above-ground accessible containers with the intent of long-term management or disposal.

Underground disposal could have been considered for radioactive waste from Maine and Vermont, Texas' partners in a low-level radioactive waste disposal compact, only if assured isolation were found not to be feasible, and the bill would have restricted the volume of waste from non-compact states. Once a disposal or assured isolation site accepted waste, title and liability for that waste would have been transferred to the authority. Acceptance or storage of low-level waste at a site owned or operated by a private entity would have created no liability for the state for damages, removal, or remedial action. A provision requiring a private entity to indemnify the state for any liability would have had to be included in any contract between the state and a private entity and in any license or permit issued by the state to a private entity authorizing that entity to operate a low-level waste site.

HB 1910 would have repealed a statutory requirement that a low-level radioactive waste facility be located in a certain area within Hudspeth County. A low-level radioactive waste site could not have been located in a county next to an international boundary, within 62 miles of the Texas-Mexico border, or in an area where the annual average rainfall was greater than 26 inches. The authority could not have chosen a site within a county in which the majority of voters in a non-binding referendum did not favor establishing such a facility.

HB 1171, as passed by the Senate, would have allowed the Texas Natural Resource Conservation Commission (TNRCC) to issue a radioactive waste disposal license to a private entity. It would have restricted the total radioactivity of U.S. Department of Energy (DOE) waste licensed for disposal by a private entity to 20 percent less than the radioactivity of waste projected to be received pursuant to the interstate disposal compact. HB 1171 would have included the same language as in HB 1910 concerning state liability for low-level waste and also would have given the state a chance to manage waste at an assured isolation facility.

Supporters of requiring that a public entity like the Low-Level Radioactive Waste Authority hold a license for any low-level waste site in Texas said this would prevent Texas from becoming a dumping ground for high volumes of waste from DOE facilities. Stipulating that a waste disposal license must be held by a public entity would keep a private entity from accepting DOE waste in the state.

Opponents said the state should allow TNRCC to license a private firm to dispose of low-level waste. A private operator could accomplish safely, quickly, and efficiently what the state had failed to do for 20 years, and no harm would ensue if that company chose in the future to dispose of DOE waste. The state could license a low-level waste disposal or assured isolation site separately for interstate compact waste if it so chose.

Notes: HB 1910 originally proposed a method for managing Texas' low-level radioactive waste. As reported from committee, HB 1910 would have required that any license for a disposal or assured isolation site be issued to the low-level radioactive waste authority. That license could not have been transferred to a private entity, although the authority could have contracted with a private entity to build and operate a site. HB 1910 was amended substantially on the House floor, and one amendment removed the provision requiring a license for a disposal or assured isolation site to be issued in the name of the authority and prohibiting transfer of the license to a private entity. HB 1910 passed the House as amended but died in the Senate Natural Resources Committee.

The House-passed version of HB 1171 proposed only minor revisions to TNRCC and TDH regulation of radioactive materials. The Senate substantially amended the bill to authorize TNRCC to issue a disposal license to a private entity. HB 1171 passed the Senate near the session's end, but died when the House did not consider the Senate amendments.

HB 2954 by Brown, effective September 1, 1999, abolishes the Texas Low-Level Radioactive Waste Disposal Authority and transfers its functions to TNRCC.

The **HRO analysis** of HB 1910 appeared in the April 29 *Daily Floor Report*. The analysis of HB 1171 appeared in the April 21 *Daily Floor Report*.

Prohibiting retroactive changes to development permits

HB 1704 by Kuempel, et al.

Effective May 11, 1999

HB 1704 requires cities, counties, and other political subdivisions to review development permits solely on the basis of requirements in effect when the original application for a permit was filed. The law voids any actions taken by political subdivisions between September 1, 1997, and the May 11, 1999, effective date that caused or required the expiration or cancellation of an affected project or permit. The law applies to projects in progress on or begun after September 1, 1997, if a political subdivision approved or issued a permit for the project or an application was filed before September 1, 1997, or if the agency imposed a requirement for the project or a deadline for a permit on or after September 1, 1997, that did not exist before that date.

All necessary permits are considered a single series of permits, and the project is bound only by the requirements in effect when the application for the first of the series of permits was made. Preliminary plans and subdivision plats for a project are considered part of the series of permits. A permit may expire five years after its filing if no progress is made toward completion of the project. The law exempts regulations and permits that govern colonias, sexually oriented businesses, coastal zone management areas, annexation, and other specific conditions.

Supporters said HB 1704 simply would reinstate a law, inadvertently repealed in 1997, that barred retroactive application of new development restrictions to those who already had a permit on file. Austin and other cities made retroactive changes for many development permits for at least two decades, often in direct contradiction to legislative intent. These changes have created regulatory uncertainty for many developers and landowners. Regulatory conditions at the beginning of a project should remain the same for the entire duration of the project.

Opponents said the bill would restrict the ability of cities to manage their growth and development and would allow projects reactivated after long periods of inaction to be completed under outdated and inappropriate regulations. Although primarily intended to address specific problems in Austin, the bill would affect adversely many cities across the state. It also would negate a compromise negotiated by the City of Austin and supported by many Austin-area developers for the development of environmentally sensitive areas. This would amount to state interference with local control.

The **HRO analysis** appeared in Part Two of the April 19 *Daily Floor Report*.

Revising the municipal annexation process

SB 89 by Madla, et al.

Generally effective September 1, 1999

SB 89 revises the municipal annexation process. Municipalities must provide full municipal services to an annexed area within two and one-half years after the effective date of the annexation. Municipalities must complete a plan to extend full services to the area to be annexed, including a program for acquiring or building capital improvements necessary to provide adequate service. An infrastructure project under the program must be completed within two and one-half years after the annexation, unless an agreement for a different deadline is reached with the landowners in the annexed area.

A municipality must prepare an annexation plan to annex land within its extraterritorial jurisdiction (ETJ). The plan must specify the annexations that the municipality intends to implement in three years' time. The specified annexations may take place no sooner than three years after the plan is adopted. Any changes to the annexation specified in the plan may take place no sooner than three years after the adoption of the changes. After the adoption or amendment of an annexation plan, a municipality must compile an inventory of services and facilities provided to each area in the plan. The inventory must include all services and facilities that the municipality is required to provide to the annexed area.

Municipalities with a population of less than 1.6 million must negotiate with property owners in the area for the provision of services to the area after annexation or in lieu of annexation. If a municipality and property owners' representatives cannot reach an agreement on provision of services, either party may request arbitration to resolve the issues in dispute. Either party may appeal to a district court any provision of an arbitrator's decision that exceeds the arbitrator's authority. If the municipality does not agree with the terms of the arbitration decision, it cannot annex the area for at least five years after the date of the decision, and the municipality must pay the cost of arbitration. If an arbitrator finds that a request for arbitration by the property owners' representatives was submitted in bad faith, the arbitrator may require the annexed area to pay all or part of the arbitration cost.

Municipalities may not prohibit persons in an annexed area from using land in the manner in which it was used before the annexation if the use was legal at that time.

Municipalities may impose regulations in annexed areas related to sexually oriented businesses, colonias, public nuisances, flood control, storage and use of hazardous substances, sale or use of fireworks, discharge of firearms, or prevention of imminent destruction of property or of injury to persons.

A municipality may not annex an area within its ETJ solely because the area is adjacent

to municipal territory that is 1,000 feet wide at its narrowest point. In an area that is annexed by a municipality but is not contiguous with other municipal territory, the ETJ is reduced to one mile. A municipality may not reannex a disannexed area within 10 years after the disannexation. If an area is disannexed, the municipality must refund to the landowners in the area the amount of money collected in property taxes and fees during the time the area was a part of the municipality, excluding the amount the municipality spent for the direct benefit of the area during that time.

Supporters said SB 89 would improve the annexation process by giving property owners and utility districts in an annexed area greater opportunities to protect their rights. The bill would ensure that cities provide full municipal services within a reasonable time frame that are sufficient to maintain a quality of life comparable to what existed before annexation. Cities should develop a three-year annexation plan to ensure that they are fully prepared to carry out an annexation and to provide residents with a clear idea of how an annexation would proceed. The bill would give residents and utility districts the opportunity to negotiate and arbitrate the terms of a municipal annexation. Arbitration would be a much faster way for residents and cities to settle their differences than the current process of filing a writ of mandamus in court.

Opponents said the deadline of two and one-half years for cities to provide full municipal services in an annexed area is too short. Cities could find it very hard to fulfill service obligations for annexations, including voluntary ones, within this time frame. SB 89 could encourage the abuse of arbitration provisions by property owners to slow down an annexation deliberately. The requirement for cities to pay for the cost of arbitration unless a request was made in bad faith would be unfair to the city.

Other opponents said the bill would not provide sufficient protection to residents in a municipal ETJ from an annexation against their collective will. Residents should be allowed to vote on whether a city may annex them or on disannexing themselves from a city. Voter approval of annexation is the only sure method to prevent cities from abusing their substantial power in the annexation process.

The **HRO analysis** appeared in Part Two of the May 20 *Daily Floor Report*.

Repealing junior water rights restriction on interbasin transfers

SB 143 by Brown, Wentworth

Died in House committee

SB 143 would have repealed two subsections of the Water Code that require that any proposed interbasin transfer of all or a portion of water rights be junior in priority to all other water rights granted before the Texas Natural Resource Conservation Commission declares an application for a transfer administratively complete. One of the targeted Water Code subsections covers all interbasin transfers except those specially exempted, while the other is limited to interbasin transfers in certain watersheds.

Supporters said that the current restrictions that require interbasin transfers of water rights be junior to other water rights that were included in SB 1, last session's comprehensive revision of state water policy, essentially have halted interbasin transfers of existing water rights, except for those specifically exempted from the junior water rights provision. Few cities or other entities are willing to pay the substantial infrastructure expenses to facilitate an interbasin transfer if they know that their claim could be preempted by senior water-rights holders at a time of critical need, such as during a drought. In order for the state to plan for future municipal and industrial water needs, interbasin transfer agreements must be able to guarantee that the basin receiving the water has the right to that water when needed. Interbasin transfers can help solve water shortages on a regional basis, and state water planners need this tool to encourage regional water planning. Making all new transfers junior to all other rights also damages the future of water marketing in Texas by stopping the use or marketing of existing water rights for interbasin transfers. Water marketing should be encouraged because it can be more palatable and effective than mandatory conservation, regulated use, or forcible reallocation.

Opponents said that proposed interbasin transfers of water rights should continue to be junior to other water rights in order to protect those in the basin of origin. Interbasin transfers should be approved in few, if any, circumstances because they threaten not only those in the basin of origin but also adjoining basins and downstream coastal basins that may count on using water that flows into their watersheds. Interbasin transfers may impede future economic development in the basin of origin or adjoining basins in ways that state regulators may not foresee at the time of the proposed transfer. Also, lower water levels may harm marinas, water sports, and fishing in reservoirs in a basin of origin. Some entities have bought additional water rights to meet future needs, and those rights need to be protected even if the water has not yet been used fully. Water is linked inextricably to the value of the land where it is located, and the transfer of water out of an area can adversely affect the property rights of those in the basin of origin.

Platting requirements for subdivisions on unincorporated land

SB 710 by Wentworth, et al.

Effective September 1, 1999

SB 710 requires a landowner in an unincorporated area of a county to prepare a plat if the owner divides the land for subdivisions, lots, or tracts of land intended for public use or for the use of lot owners. A plat is not required for subdividing land used primarily for agriculture, ranching, wildlife management, or timber production or on land where all lots were sold through the Veterans Land Board program. Also, a plat is not required if each lot in the subdivision is transferred to an individual related to the owner or if each lot is more than 10 acres in area and contains no land dedicated for public use.

The law requires county commissioners courts to review and approve plat applications within 60 days after receiving a complete application. If a county receives an incomplete application, it must notify the applicant of the missing information within 10 days and must allow the applicant to submit the information in a timely manner. If the county fails to take final action on a plat application before the deadline, the application is granted automatically and the applicant may apply for a writ of mandamus to compel the county to recognize the approval of the plat.

The law allows counties to require reasonable specifications in subdivisions to provide drainage, manage storm-water runoff, and coordinate subdivision drainage with general storm drainage patterns in the area.

Supporters said that unscrupulous developers have exploited a legal loophole to create rural residential subdivisions that are designed to avoid county development regulations. These “flag lot” developments, so called because only a narrow strip connects them to a county road, often have insufficient water and wastewater services, creating health hazards for residents in the subdivisions and in adjoining areas. These developments also suffer from poor road conditions and inadequate drainage. The state should prohibit flag lot developments to ensure the safety of residents in and around these developments and to protect the property rights of adjoining landowners.

Opponents said the state should not give such broad rulemaking authority to counties in response to a few cases of unscrupulous development. The 10-acre threshold for lots to be exempt from platting requirements should be reduced to five acres to conform to other development standards.

The **HRO analysis** of the House companion bill, HB 423 by B. Turner, appeared in Part One of the April 26 *Daily Floor Report*.

Voluntary permitting of "grandfathered" facilities

SB 766 by Brown

Effective August 30, 1999

SB 766 creates a voluntary emission reduction permit (VERP) for which “grandfathered” industrial facilities may apply before September 1, 2001. These facilities are exempt from certain air permitting requirements because their construction predated the 1971 Texas Clean Air Act. VERPs require facilities to use air-pollution control equipment at least as beneficial as 10-year-old best available control technology (BACT), except for facilities located in areas designated as near-nonattainment or nonattainment because these areas do not meet certain national air-quality standards. Facilities in those areas must use either a control method at least as beneficial as BACT or a technology that the Texas Natural Resource Conservation Commission (TNRCC) finds achievable for facilities of the same type in that area. TNRCC must give priority to processing permit applications for facilities located less than two miles from the outer perimeter of a school, day-care facility, hospital, or nursing home.

VERPs are not subject to contested case hearings, and the holder of a VERP may defer the implementation of air-contaminant emission reductions by substantially reducing other specific air contaminants. VERP holders also may be granted emission-reduction credits if the permit holder conducts emission-reduction projects to offset the facility’s excessive emissions. To be eligible for such a credit, a project must reduce emissions in the airshed in which the facility is located. Qualifying emissions-reduction projects include electricity generation by wind or solar power, purchase and destruction of polluting vehicles, car pooling, conversion of motor vehicle fleets to alternative fuels, and reduction of emissions from permitted facilities to levels significantly below those necessary to comply with the permit. SB 766 also grants an amnesty from enforcement for certain illegal actions and modifications taken before March 1, 1999, as long as the facilities that took these actions apply for a VERP by August 31, 2001.

The law also creates a multiple plant permit (MPP) for existing facilities at multiple locations. TNRCC may issue MPPs for multiple plant sites owned and operated by the same individuals or a group under common control if TNRCC finds that the aggregate rate of air-contaminant emissions authorized under the MPP does not exceed the total emission rates authorized in existing permits for previously permitted facilities, or does not exceed 10-year-old BACT rates for unpermitted facilities or those holding VERPs. Issuance, amendment, or revocation of MPPs applies only to existing facilities for which applications are filed before September 1, 2001. There is no application deadline for MPP permits.

SB 766 allows TNRCC, by rule, to develop criteria for facilities or groups of facilities, establishing a *de minimis* level of air contaminants below which new-source review permits are not required. TNRCC also may issue standard permits outside the rulemaking process and must establish procedures for issuance, amendment, renewal, and revocation of standard permits, which are not subject to contested case hearings. The law also authorizes permits by rule for facilities that will not contribute significantly to air contaminants and provides that standard exemptions are only for changes made to facilities rather than for types of facilities.

On or after September 1, 2001, TNRCC must impose a fee for all emissions, including those in excess of 4,000 tons, by grandfathered facilities that do not have permit applications pending. The fee will be tripled for emissions exceeding 4,000 tons each fiscal year.

Supporters said SB 766 would reduce air pollution significantly by giving companies strong incentives to volunteer to give up their grandfathered status. The companies would not be mandated to do so, however, and plants would have flexibility in how they reduced emissions. A temporary amnesty of enforcement actions and the possibility of a substantial fee increase after 2001 for excess emissions at grandfathered facilities with no permit applications pending would tempt many facilities to volunteer to be permitted. The two new kinds of permits created by the bill, VERPs and MPPs, would result in significant reductions of pollution, but would be flexible enough to appeal to a wide variety of facilities. The state already has solid evidence that voluntary programs for grandfathered facilities work. Since 1997, more than 50 companies have volunteered to relinquish their grandfathered status. Allowing the use of 10-year-old BACT for VERP permits that are not in near-nonattainment or nonattainment areas would give companies flexibility in fulfilling permitting requirements at a reasonable pace that would not result in worker layoffs or plant closings.

Opponents said SB 766 would fail to do the one thing that would protect Texas' air resources from grandfathered emissions: set a date certain by which all grandfathered facilities no longer could claim the exemption. Instead, the bill would create a two-year program in which grandfathered facilities could take advantage of a more lenient permitting process, but it would not end the loophole when the voluntary program ended. The exemption that allowed these facilities to escape permitting for 28 years would remain in place. This is unacceptable in view of the fact that 36 percent of all industrial air pollution in Texas comes from grandfathered sources, and there is no guarantee that the 77th Legislature will close the loophole.

The **HRO analysis** appeared in the May 20 *Daily Floor Report*.

Revising colonia regulations

SB 1421 by Lucio, et al.

Effective September 1, 1999

SB 1421 makes a number of changes to colonia-related laws to improve water and wastewater service provision, revise subdivision development requirements in border counties, and coordinate colonia policies among state agencies and local governments.

The commissioners court for a border county may grant a delay or variance to a subdivider of an unplatted subdivision or to a resident purchaser of a lot in such a subdivision from compliance with certain subdivision development requirements. Municipalities and border counties may provide utility services to unplatted land if the land was not subdivided after September 1, 1995, and if water service is available within 750 feet of the land, or if a water service provider operating more than 750 feet from the land determines that it would be feasible to extend service to the land.

Residential water supply or sewer connections for projects in border counties may be undertaken without a plumbing license if the work is performed by an organization certified by the Texas Natural Resource Conservation Commission (TNRCC) to provide self-help project assistance. To perform the work without a license, an organization must provide the Texas State Board of Plumbing Examiners with the specific project location, duration, and other required information at least 30 days before the date the project is to begin. An organization also must provide a post-construction report by a plumbing inspector to certify that the plumbing is safe.

The executive administrator of the Texas Water Development Board (TWDB) must review and approve the process a political subdivision uses to procure engineering services for facility engineering in economically distressed areas. TWDB may terminate a service provision contract between the board and a political subdivision for facility planning under an Economically Distressed Areas Program (EDAP) grant if the board determines that the planning activities of the subdivision are inadequate or not completed in a timely manner.

TNRCC may award grants for conservation or environmental protection and must establish procedures for doing so. TNRCC must develop a standard method to determine which utility or corporation among multiple applicants is the most capable of providing continuous and adequate service under a certificate of public convenience and necessity. TNRCC must award the certificate to the utility or corporation that is the most capable of providing the service as determined under the standard method.

A person who violates a municipal or county rule based on the model subdivision rules or

platting requirements in EDAP-eligible counties is liable for a civil penalty of \$500 to \$1,000 for each violation and each day of violation, not to exceed \$5,000 each day. The attorney general or an attorney representing the municipality or county may sue to collect penalties, file an injunction to enjoin a violation, and apply for monetary damages to cover the cost of enforcing the rules or requirements. All EDAP-eligible counties have the authority to enforce platting requirements in the extraterritorial jurisdiction of a municipality within the county.

A commissioners court of an EDAP-eligible county may establish a planning commission to regulate subdivisions, including reviewing and approving subdivision plat applications and household requests for utility services. A planning commission must review plat applications within 60 days, or an applicant may apply for a mandamus order in a district court. The governor may designate an agency to coordinate the state's colonia initiatives among state agencies and local officials. The coordinating agency may appoint a colonia ombudsman in each of the six border counties with the highest population of colonia residents, as determined by the agency.

Supporters said SB 1421 would incorporate into current colonias policies significant lessons learned over the past 10 years. The variances and other exemptions are necessary to allow residents to receive basic services that have been prohibited by strict platting requirements intended to stop unscrupulous land development. The reforms for choosing among applicants for certificates of public convenience and necessity would allow TNRCC to improve efficiency in awarding such certificates, since the inability to resolve conflicts among potential service providers has significantly delayed service provision for many colonia residents. The bill would clarify and strengthen the ability of the attorney general and local governments to enforce platting requirements and other regulations adopted under the guidelines for model subdivision rules. Planning commissions could improve the rate of providing services to colonia residents and create a stronger check against substandard developments. TNRCC needs the grant authority under the bill to improve its ability to fund projects related to colonias.

Opponents said the bill might not give planning commissioners enough time to review a large number of plat applications at any given time. This could hinder a commission's ability to prevent substandard colonia developments.

The **HRO analysis** appeared in Part One of the May 19 *Daily Floor Report*. See also HRO Focus Report Number 76-10, *Colonias Legislation: History and Results*, April 16, 1999.

Creating 13 groundwater districts with limited authority

SB 1911 by Brown, et al.

Effective September 1, 1999

SB 1911 creates 13 groundwater conservation districts with limited powers. Temporary directors are to be appointed by county commissioners courts within the district boundaries, most of which follow county boundaries. The temporary directors will have some of the powers granted to directors of districts under Water Code, chapter 36, including the authority to impose user fees to pay for district operations. However, these districts do not have the authority granted in chapter 36 to hold elections, issue bonds, impose taxes, exercise the right of eminent domain or annexation, or develop comprehensive long-term management plans. The temporary directors may regulate but not prohibit the transfer of water out of a district. Confirmation elections for the districts may not be held unless the 77th Legislature decides to ratify their creation. If not ratified, the districts will be dissolved September 1, 2001. If ratified, a district may call a confirmation election no earlier than September 1, 2001.

Supporters said that the creation of 13 groundwater districts would protect Texas' groundwater resources, which in many areas are being depleted faster than they can be recharged. SB 1 by Brown et al., the omnibus water bill enacted by the 75th Legislature, expressly provided that such districts are the preferred method of managing groundwater in Texas. Although the districts would not immediately exercise the full powers granted to chapter 36 districts, they could begin planning how best to protect groundwater resources and working with adjoining districts to protect shared water resources. Local residents know best about local water issues and what is needed to protect and conserve groundwater. If local districts are not created to protect groundwater, the courts may end up imposing their own regulatory structure over groundwater resources.

Opponents said that creating 13 districts based on political rather than hydrological boundaries would make it difficult for the districts to protect groundwater resources, which are based on watersheds, aquifers, and geological configurations rather than on county boundaries. Indeed, numerous single-county districts would impede the regional planning process proposed by SB 1. Creation of these districts should be delayed until the Legislature can review new data on groundwater availability and until regional planning groups can determine the water needs of each separate region. In the past, some districts have done little to regulate water withdrawals in their area. The state should limit creation of any new districts to those with the authority and geographic scope to truly protect Texas' groundwater resources.

The **HRO analysis** appeared in the May 24 *Daily Floor Report*.

Families and Children

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Requiring minors to wear bicycle helmets

HB 673 by Carter, et al.

Died in the Senate

HB 673 would have required a person younger than 15 to wear a secured, properly fitting protective helmet while operating or riding as a passenger on a bicycle on a public road, bicycle path, or other public right-of-way in a municipality with a population of 200,000 or more. The parent or guardian of a person under 15 could not have knowingly or recklessly permitted the youth to operate or be a passenger on a bicycle without wearing a helmet. In a cause of action in which damages were sought for injuries or death resulting from the operation of a bicycle by a person under 15, failure of a parent or legal guardian to ensure that the child wore a helmet would not have constituted civil liability on the part of the parent or guardian.

A person in the regular business of selling bicycles in a city of 250,000 or more would have had to provide a written explanation of the helmet requirement to every purchaser. A person could not have rented a bicycle to another person unless each person under 15 known to operate or ride on the bicycle possessed a properly fitting protective helmet at the time the bicycle was rented or unless the rental agreement provided a properly fitting helmet for each person under 15.

A person who sold bicycles would not have been liable for civil damages resulting from the failure to provide written explanation of the helmet requirement or from a bicycle passenger's or operator's failure to wear a helmet. This immunity would not have applied to a seller who provided false information regarding the requirement.

The bill would have authorized the Department of Public Safety (DPS) to encourage the media to disseminate public service announcements regarding hospitals and other entities that had volunteered to provide free helmets to the public.

Supporters said HB 673 would reduce the number of bicycle-related deaths and injuries among children. The public has a right to insist on proper safety on public roads and rights-of-way. Because bicyclists do not carry liability insurance, taxpayers eventually pay for health costs resulting from bicycle-related injuries. The lifetime cost of treating a child with a serious head injury can be \$4.5 million.

HB 673 would eliminate one of the biggest causes of children's reluctance to wear helmets — the fear of being different. The bill would apply to all children younger than 15, therefore removing the stigma of wearing a helmet. It also would promote safe, fun bicycling. Public awareness, education, and safety campaigns have been shown to lose effectiveness without mandated helmet use. While these programs are useful tools, they

are no substitute for a helmet on a child's head.

Mandated bicycle helmet use for children is an issue of public safety, not of personal freedom. Helmet laws are no more an infringement on personal liberties than are seat-belt laws or speed limits. Texas has many laws aimed at protecting children, including requiring special seats for children riding in vehicles. Many organizations, including DPS, provide free helmets to low-income children. Therefore, the requirement to buy or obtain a helmet should not burden anyone.

Opponents said that bicycle-related deaths are rare, and although tragedies do occur, the number of children dying from head injuries is not sufficient to warrant a state law. Parents, not state government, should enforce rules for their children. Most parents know what is best for their children and want to protect them.

Bicycle helmets are not failsafe. It is possible to receive a serious head injury even while wearing a helmet. On the other hand, many children ride bicycles without helmets without getting hurt. Helmet laws infringe on personal rights, a primary reason why the Legislature in 1997 repealed mandatory helmet use for motorcycle riders over 21.

The **HRO analysis** appeared in the Part One of the April 27 *Daily Floor Report*.

Agreements to convert separate property to community property

HJR 36/HB 734 by Goodman

Effective January 1, 2000, pending voter approval of HJR 36

HJR 36 would, if approved by the voters on November 2, 1999, amend the Texas Constitution to allow spouses to agree in writing to convert all or part of their separate property to community property. **HB 734**, the implementing legislation for HJR 36, would allow such a conversion if:

- the agreement was in writing and signed by both spouses, identified the property to be converted, and specified that the property was to become community property; and
- the agreement was enforceable without consideration.

HB 734 would apply different provisions for management, control, and disposition of community property. If the converted property was in the name of one spouse or was transferred to community property without any proof of other ownership, the property was under the sole management of that one spouse. If the converted property was held in the name of both spouses or, absent proof of other ownership, was owned by both spouses before conversion, the property would be under the joint management of both spouses.

HB 734 specifies the language in an agreement that would provide a rebuttable presumption that the agreement was made voluntarily and with full knowledge of its legal effects. Converting separate property to community property would not affect any rights of a preexisting creditor of the spouse whose separate property is being converted.

Supporters said HJR 36 and HB 734 would authorize the conversion of separate property to community property just as community property may be converted to separate property. This reciprocity would give Texas spouses more freedom in disposing of their separate property. Texas already allows prenuptial agreements that provide for conversion of certain community property to separate property. The bill would accommodate the desires of some spouses to go the other way and convert separate property into community property.

Allowing this conversion also could provide tax benefits for spouses. When a separate property asset is converted to community property, there may be a “step up” in the basis of the converted property without any tax consequences.

Opponents said the conversion of separate property to community property could lead to unintended consequences. While in a happy marriage, a spouse may convert separate

property to community property only to regret that decision if the marriage turns sour. Upon divorce, what formerly belonged to that spouse could be divided in half. The change in the character of the property would appear irrevocable, as the proposed standard provisions in the conversion agreement would create a rebuttable presumption that the agreement accurately reflected the wishes of both spouses. Conversely, if an agreement did not contain this standard provision, a spouse could convert his or her property without full knowledge of the legal effects.

The principle that underlies community property — part of a longstanding tradition in the Texas Constitution — is that this property be “built up” by both spouses during the marriage. A spouse should be able to share only what is earned during marriage and should be protected from having his or her separate property converted.

The **HRO analysis** of HB 734 appeared in Part Two of the April 26 *Daily Floor Report*, and the analysis of HJR 36 appeared in Part One of the April 28 *Daily Floor Report*.

Parental notification of abortions performed on minors

SB 30 by Shapiro, et al.

Effective September 1, 1999, and applicable January 1, 2000

SB 30 requires the physician of an unmarried minor seeking an abortion to notify one of her parents or her court-appointed managing conservator or guardian and then wait 48 hours before performing the abortion. The physician may perform the abortion without notifying the parent or guardian if the physician determines and certifies to the Texas Department of Health (TDH) that a medical emergency exists requiring an immediate abortion to avert the minor's death or avoid serious risk of substantial and irreversible impairment of a major bodily function. The 48-hour period for notice may be waived by an affidavit filed by the parent, conservator, or guardian.

If the minor does not wish to have her parent notified, she may apply for judicial approval from a county court at law, a probate court, or a district court, including a family district court. The judge must grant the minor permission to consent to an abortion if the judge finds by a preponderance of the evidence that notification would not be in the minor's best interest, that the minor is mature and capable of giving informed consent, or that notification might lead to physical, sexual, or emotional abuse. Court proceedings must be conducted expeditiously and must protect the minor's anonymity and confidentiality. If the judge denies permission, the minor may appeal to the court of appeals. If either the judge or the court of appeals fails to rule within two business days, permission is granted automatically. The minor's grandparent, adult sibling, aunt, or uncle, a clergy member, a mental health professional, an appropriate employee of the Texas Department of Protective and Regulatory Services (DPRS), or another appropriate person may serve as the court-appointed guardian ad litem. TDH must give the pregnant minor informational materials in English and Spanish about her rights under SB 30, the judicial approval and appeal procedure, alternatives to abortion, and related health risks.

A physician who intentionally performs an abortion in violation of this law commits an offense punishable by a fine not to exceed \$10,000. It is a defense to prosecution that the minor falsely represented her age by displaying an apparently valid governmental record of identification, but the defense does not apply if the physician has independent knowledge of or fails to use due diligence in determining the minor's actual age or identity. If the physician executes and includes in the minor's medical record an affidavit stating that, according to the physician's best information and belief, notice or constructive notice by certified mail has been provided, the affidavit creates a presumption that the parental notification requirements have been satisfied.

A physician who has reason to believe that a minor has been physically or sexually

abused by a person responsible for the minor's care must report the suspected abuse and refer the minor to DPRS. A guardian ad litem also must report suspected abuse to law enforcement, DPRS, or other appropriate authority.

Supporters said parental notification statutes enable parents to know about and be involved in their daughters' decisions about abortion. SB 30 is similar to laws in other states that the U.S. Supreme Court has upheld as constitutional because they ensure the minor's privacy and offer reasonable alternatives to parental notification. For non-invasive procedures such as tattoos, parents not only must be notified but must give their permission. The minor should have the support of a parent when she makes her decision to have a dangerous and invasive medical procedure that could place her life at risk. Parental notification of a minor's intent to have an abortion would enable parents to provide vital medical information, such as whether the minor has drug allergies, and to watch for possible signs of infection after the procedure.

The state has a legitimate interest in protecting minors from their own immaturity, inexperience, and lack of judgment. The choice of whether or not to have an abortion is often highly charged with conflicting emotions. The repercussions of such a choice can have emotional and psychological consequences on the girl for many years. Some minors may not be able to make a mature, rational choice. Even when the relationship between parent and child is strained, a parental notification law would allow the parent to give the minor much-needed advice and support.

The judicial bypass procedure would require the judge to determine whether the minor was mature and capable of giving informed consent, whether notifying her parent would not be in her best interest, or whether notification might lead to physical, sexual, or emotional abuse of the minor. If the judge found any one of these factors, the judge would have to allow the minor to consent to an abortion without parental notification, while also ensuring confidentiality and protecting the minor's anonymity. The two-day decision deadline would ensure that a court could not delay or stall the performance of an abortion. SB 30 also would allow a grandparent, adult sibling, aunt, uncle, clergy, mental health professional, DPRS personnel, or another appropriate person to counsel and act as the minor's guardian ad litem if she chose to go through the court rather than notify a parent about her abortion decision.

Opponents said SB 30 would discourage and reduce the number of legal abortions by setting up hurdles and removing medical confidentiality for teens who wish to exercise their constitutional right to obtain an abortion. Most minors who seek abortions tell a parent about their decision, but for those who do not, parental notification statutes increase the risk of harm to the minor from repercussions at home and from additional complications caused by delays. A mandatory waiting period assumes that the minor

needs more information or needs to do more soul-searching, but to assume she has not done this already is an insult. If a minor is old enough to be a mother, she is old enough to decide whether to terminate her pregnancy.

A primary effect of the 48-hour waiting period would be to give parents the time to talk the girl out of her decision. This law would serve no legitimate state interest in protecting the health of a minor and, in fact, it would drive girls to seek unsafe or illegal abortions when they realized that their only choices were telling their parents or going before a judge for permission. Judicial bypass could be a scary and humiliating process for a girl.

Other opponents said it is important to ensure that girls who are pregnant and looking for options have access to trustworthy and understanding adults with experience in abortion counseling. This adult would not necessarily be the young woman's parent, who may know nothing about the procedure or may not be open to discussion with the minor. Many families are not structured traditionally with a mother and father, and for these girls a grandparent, an adult sibling, or an aunt or uncle is the primary caretaker or is the minor's most trusted family member and should be the one who is notified of the minor's abortion intentions.

SB 30 would not provide other options if the minor did not want a parent to be notified and was scared of or uneducated about the judicial system. The bill should include alternatives to court that might alleviate some of the minor's fear, especially if her guardian ad litem was not someone with whom she was familiar. Notification of the abortion to the minor's spiritual leader, a minister, or a pastor would be a good way to ensure that the minor would receive counseling and guidance on her decision and would give the minor another option besides judicial bypass. Other states provide such alternative bypass options for minors.

The **HRO analysis** appeared in Part One of the May 19 and May 21 *Daily Floor Report*.

Administration of child-support enforcement program

SB 368 by Harris

Effective September 1, 1999

SB 368 leaves the state's child-support enforcement program under the Office of the Attorney General (OAG) and requires a limited review of the program again in two years. The attorney general must redesign and improve the child-support enforcement program, and the program is subject to review under the Sunset Act as if it were a state agency. The Sunset Advisory Commission must analyze the degree to which the OAG has improved the program, resolved computer system implementation issues, complied with federal welfare-reform mandates, improved customer service, and increased customer satisfaction. The commission must report its findings to the 77th Legislature. The attorney general's child-support enforcement division must investigate the use of alternative sources of revenue to operate the child support program. The division must perform a cost-benefit analysis of charging fees, including a paternity establishment fee and a service fee, and must report on the effectiveness of all enforcement tools and on the progress and impact of the agency's efforts to use private contractors.

SB 368 makes numerous other changes, including:

- replacing existing procedures for voluntary paternity establishments with new provisions that allow a man who voluntarily signs a paternity acknowledgment to be considered the legal father for purposes of child support without a court order establishing paternity;
- allowing orders of a child support master (an attorney appointed by the presiding judge of a judicial region to hear enforcement cases), other than recommendations of enforcement by contempt and of immediate incarceration, to become orders of the court without ratification of the referring court if an appeal had not been filed or if an appeal had been waived;
- requiring the IV-D agency — the state agency designated to administer child-support enforcement cases in which the recipient also receives certain federal benefits and in which the recipient applies for enforcement services — to establish a standing work group with other state agencies involved in the child support program, a county advisory work group to help the agency develop and change child support programs that affect counties, and an ombudsman program to process and track complaints against the agency; and
- outlining the responsibilities of the state case registry and the state disbursement unit to be a unified system.

Supporters said SB 368 would leave Texas' IV-D child-support enforcement operations with the OAG for a two-year probationary period to institute changes and give the new attorney general a chance to improve the program. There is no evidence that transferring the operations to another state agency, without initiating other changes proposed in SB 368 and additional management changes, would improve the program. The new OAG administration has pledged to make many management changes and to use this bill's proposed changes to get the program up to speed. The OAG has the program infrastructure in place and is the only agency with the experience to keep the program going while making the necessary changes. As the state's legal services agency, the OAG has the necessary authority and legal experience to deal with parents who owe child support. The Legislature has adequate oversight of the child support program and of the OAG through the lawmaking process and the detailed appropriations process that examines performance measures.

Many of the bill's provisions were recommended in the sunset review and would improve the program. Also, the bill would institute many federal requirements imposed on the states by the federal welfare-reform law. If Texas failed to enact these changes, the state's share of federal funds could be cut.

Opponents said the state's IV-D child-support enforcement activities should be moved to another state agency because of the poor performance and managerial problems of the OAG's child-support enforcement division. Also, having the IV-D program under the oversight of an elected official, the attorney general, limits legislative and local government input into the program, since statewide elected officials are more accountable to the electorate than to the Legislature. The OAG's child-support enforcement efforts have resulted in low collection rates, decreasing paternity establishments, and diminishing rates for obtaining child support orders. Only a change to another agency would allow the types of changes that are needed to get the program back on track. The agency could be transferred to one of the state's health and human services agencies so that it could have closer ties to those programs.

The **HRO analysis** appeared in Part One of the May 19 *Daily Floor Report*.

SB 644 would have given Texans the option of entering into a covenant marriage rather than a traditional marriage. Applicants would have received premarital counseling and would have presented a signed and notarized affidavit of intent to enter into a covenant marriage. It would have been more difficult to get a divorce in a covenant marriage than in a traditional marriage. A divorce could have been granted only if the spouses had lived apart for two years; the spouse seeking the divorce had been abandoned by the other spouse for one year; the spouse seeking the divorce had a protective order against the other spouse; the other spouse had committed adultery; or the other spouse had been convicted of a felony or imprisoned for at least one year without a pardon and that conviction was not based solely on the testimony of the spouse seeking the divorce. Spouses seeking a divorce based on adultery or living apart for two years would have been required to receive marriage counseling before the divorce would be granted.

Supporters said the bill would allow Texans to enter into marriage contracts that would be enforced just as strongly as any other legal contract. “No-fault” divorce, now available for traditional marriages, allows parties to get a divorce based on the vague grounds of “insupportability.” This has weakened the family structure and made it too easy for spouses to leave the marriage without trying to work out their problems. Establishing roadblocks to divorce and giving people the option of limiting their own access to no-fault divorce would strengthen families and protect women and children. The bill would allow divorces in situations where there was adultery, domestic violence, or one of the parties was convicted of a felony or incarcerated. The traditional marriage option still would be available, and the restrictions of covenant marriage would apply only to couples who wanted such a marriage.

Opponents said the bill would trap some couples into marriages that would not benefit either party or their children. An already bad family situation would be worsened if the parties had to wait two years before getting a divorce. The bill would bring a return to the days before no-fault divorce when couples routinely lied about adultery or abuse in order to receive a quick divorce that both parties wanted. Couples already can agree to any restrictive covenant on their own or through their church or religious faith. The state should not entrench itself even deeper in the personal lives of its citizens. Only two other states, Arizona and Louisiana, have enacted covenant marriage laws, and there are serious questions concerning the legal impact of these marriages on child custody and on interstate application of the laws.

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Eliminating staff briefing exception to open meetings law

HB 156 by Wolens, Maxey
Effective August 30, 1999

HB 156 eliminates the open meetings exemption for staff briefings. The law defines a meeting as any gathering at which a quorum of a governmental entity exchanges information or questions with any third person, including an employee, about public business or policy over which the entity has supervision or control. The Texas Growth Fund Board may hold a closed meeting with one or more employees or with a third party relating to an investment or a potential investment by the growth fund. The law establishes an affirmative defense to prosecution if the member of the governmental body acted in reasonable reliance on a court order or on an interpretation by the attorney general or the attorney for the governmental body.

Supporters said HB 156 would eliminate a loophole in the open meetings law. The staff briefings exception allowed under current law is in direct conflict with general standards of open government. The notion that the members of a governmental body can meet with an employee behind closed doors, ask questions and receive answers, and still not be conducting public business makes little sense. Under current law, a staff briefing is not a deliberation because the members do not engage in direct conversation with each other. However, because members may hear the questions and answers posed to staff by other members and can ask questions based on those questions, such proceedings should fall within the realm of deliberations.

In practice, the staff briefings exemption allows significant negotiation and deliberation to occur, but because the staff briefings are not open to the public or the media and do not require an agenda, minutes, or recording, no one other than the participants is aware of how much public business actually is discussed behind closed doors. Sufficient exceptions to the open meetings law already exist for sensitive matters such as personnel decisions, property acquisition, and discussion of future or pending litigation.

Opponents said many governmental entities use staff briefings for the legitimate purpose of educating officials about an issue that is not yet ready to be discussed in public. Without a staff briefings exception, many members of governmental bodies, particularly small bodies, could not receive information in a timely manner. HB 156 would force members to be kept in the dark about important events or incidents until a public meeting could be called and the information prepared for public use.

The **HRO analysis** appeared in the April 12 *Daily Floor Report*.

Regulating amusement rides

HB 1059 by Keel, et al.
Effective January 1, 2000

HB 1059 authorizes municipal, county, or state law enforcement officials to enter and inspect an amusement ride at any time without notice to determine compliance with the requirements of the Amusement Ride Safety Inspection and Insurance Act. It authorizes law enforcement officials to shut down an amusement ride immediately if:

- the operator of the ride cannot provide a copy of a certificate of inspection by an insurance inspector or an insurance policy;
- the officer reasonably believes that the ride operator is not in compliance with the insurance and inspection requirements; or
- the officer reasonably believes that the ride is unsafe or that any passenger's safety is threatened.

If closed because of an inspection or insurance violation, a ride will remain closed until the operator presents proof of compliance. If a ride is shut down because it is believed to be unsafe, it will remain closed until:

- on-site corrections are made;
- a district judge, county judge, judge of a county court at law, justice of the peace, or municipal judge permits the ride to resume operation; or
- the insurance company reinspects the ride and delivers to the Texas Department of Insurance and the law enforcement officer a reinspection certificate declaring the ride to be in compliance.

HB 1059 prohibits the operation of a mobile ride on which a death has occurred. If the ride complied with insurance and inspection requirements at the time of the death, it may be reopened after reinspection. If not in compliance when the death occurred, it may reopen only after complying with the requirements. The law requires the insurance commissioner to adopt rules requiring operators to perform inspections of mobile amusement rides, including daily inspections of safety restraints.

HB 1059 does not apply to rides that operate in a fixed location in a park attended by more than 200,000 visitors in the year preceding the inspection. Operating a ride that had been shut down before it was allowed to reopen or failing to comply with insurance and inspection requirements is a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. The law makes it a Class B misdemeanor offense to operate an amusement ride or assemble a mobile amusement ride while intoxicated.

Supporters said law enforcement officials should be able to shut down dangerous rides immediately, without having to spend the time to get a court order. In some cases, the people operating the rides are intoxicated or under the influence of drugs. Other times, rides show obvious wear or other safety problems that should be dealt with immediately. The threat of jail time or lost revenue from closed operations under HB 1059 would encourage operators to maintain the safety of their rides.

Even though officers may not be trained to recognize every potential problem on a carnival ride, they are qualified to observe and to shut down a ride for egregious breaches of safety. The bill would allow officers to take action when riders call safety problems to their attention. An operator who felt that an officer had shown unfair treatment or had performed an inaccurate inspection could go to a local magistrate to remedy the problem. In light of the transient nature of traveling carnivals, this immediate type of remedy would benefit everyone.

Amusement parks with more than 200,000 visitors annually should be exempt from the bill because they tend to have their own well-trained inspectors. While the state requires only annual inspections, big parks usually inspect their rides daily.

Opponents said law enforcement officials are not mechanics and have no experience in inspecting amusement rides. An officer who shut down a perfectly safe ride could cause operators financial harm and needless bad publicity. An officer who did not shut down a ride later found to be unsafe could face liability problems. Under this bill, officers could shut down rides if they “reasonably believe” them to be dangerous. This vague wording would open the door to officers closing rides for no compelling reason. Also, the bill should limit the types of law enforcement officers allowed to inspect rides and how many officers could make inspections at one time. In an extreme case, the bill could allow an entire police force to comb carnival grounds looking for safety problems they could not verify.

Other opponents said the bill should establish a system of independent state inspectors of carnival rides rather than leaving this important responsibility to employees of insurance companies. An insurance company has a financial interest in maintaining the policy and therefore may be reluctant to find fault with a ride it insures. Also, larger amusement parks with annual attendance of more than 200,000 should not be exempt from the bill. The larger parks should be held to even stricter standards, given their much higher volume of customers compared to those of traveling carnivals.

The **HRO analysis** appeared in Part Two of the April 27 *Daily Floor Report*.

Workers' Compensation Insurance Fund revisions, tax refund

HB 3697 by Siebert, et al.

Effective August 30, 1999

HB 3697 revises the Texas Workers' Compensation Insurance Fund by refunding maintenance tax surcharges, changing the process for establishing premiums, requiring the fund to be a member of the Texas Property and Casualty Insurance Guaranty Association, and providing for interim studies.

The comptroller and the Texas Department of Insurance must prepare a list, by year, of insurance companies and self-insurers who paid a maintenance tax surcharge assessed for calendar years 1991 through 1996. Within 45 days of receiving the lists, the fund will issue separate checks from the surplus to each insurance firm and self-insurer for each year in which they had paid the surcharge. All refunds or credits must be paid by September 1, 2000.

Each policyholder insured by the Texas workers' compensation insurance facility, the fund's predecessor, during the 1992 and 1993 recoupment periods will be entitled to a refund of the proportionate share of the maintenance tax surcharge. Each policyholder insured by the Workers' Compensation Insurance Fund during the 1994 and 1995 recoupment periods also is entitled to a refund. Each policyholder not insured by the fund during each recoupment period between June 1, 1992, and May 31, 1998, is entitled to a proportionate share of the refund paid to an insurance company.

The law allows the Workers' Compensation Insurance Fund to establish multitiered premiums to set prices for insurance policies in the fund's programs. The premium pricing systems can provide for lower premium payments. The Workers' Compensation Insurance Fund must become a member of, and be protected by, the Texas Property and Casualty Insurance Guaranty Association. HB 3697 also eliminates the Workers' Compensation Insurance Fund's current tax credit of 2 percent of gross workers' compensation premiums written during the period for which taxes are assessed.

The Workers' Compensation Insurance Fund must conduct an interim study with the Research and Oversight Council on Workers' Compensation to examine and make recommendations to the 77th Legislature by February 1, 2001, on:

- ways to improve worker safety and facilitate return-to-work programs;
- the quality and cost-effectiveness of the current health-care delivery system; and
- medical providers' treatment patterns and insurance carrier utilization review practices.

Supporters said the Workers' Compensation Insurance Fund needs to be changed to ensure that it does not have advantages over other workers' compensation carriers in Texas. The fund, which requires \$400 million to cover pending and anticipated claims, now contains \$800 million. The \$400 million surplus should be refunded to insurers and policyholders, not spent by the state government. The fund no longer should receive the 2 percent tax credit on the previous year's premiums. The tax credit gives the fund an unfair competitive advantage over other insurers who must pay the tax, because the fund can write premiums at a lower rate than can other insurers.

The fund should become a member of the Texas Property and Casualty Insurance Guaranty Association like all other similar insurers. The fund is a viable part of the workers' compensation market, and currently there is no process for what would happen if the fund failed.

Opponents said the surplus in the Worker's Compensation Insurance Fund should revert to the state's general revenue fund because the state provided the initial bonds to start the fund. In general revenue, the surplus funds could help pay for a general tax cut, boost education spending, or be put to many other worthy uses.

The fund should retain the 2 percent tax credit instituted when the fund took over the policies of the state's previous insurer of last resort. At that time, the fund inherited many high-risk policies, and the tax credit was intended to offset the losses involved in writing these risky policies. As the state's insurer of last resort, the fund still provides coverage for businesses that private insurers will not insure. Therefore, the need for the tax credit remains.

The **HRO analysis** appeared in Part Two of the May 4 *Daily Floor Report*.

Constitutional revision

HJR 1 by Junell, et al./SJR 1 by Ratliff
Died in House Committee/Died in Senate Committee

HJR 1/SJR 1 would have rewritten the Texas Constitution. Proposed changes included:

- establishing six-year terms for senators, with term limits of nine consecutive regular sessions, and four-year terms for House members, with term limits of eight consecutive regular sessions, beginning when the new constitution took effect;
- allowing the Legislature to hold pre-session organizational meetings and post-session meetings to consider gubernatorial vetoes;
- establishing a salary commission to set compensation for legislators and elected and appointed executive and judicial branch officials;
- allowing the governor to appoint a cabinet of the heads of executive departments, including state, interior, public safety and criminal justice, health and human services, education, agriculture, economic development, energy, and transportation, with the lieutenant governor, the comptroller, and the attorney general still elected statewide;
- allowing the governor to reorganize the executive branch, subject to a one-house legislative veto;
- granting the governor direct authority over reprieves, pardons, and commutations of sentence rather than requiring that the Board of Pardons and Paroles recommend those actions;
- allowing the governor to intervene in any legal action involving the state;
- merging the Texas Supreme Court and the Court of Criminal Appeals into a single 15-member court with a single chief justice and civil and criminal divisions;
- allowing the governor to appoint appellate and district court judges, with potential nominees restricted to a list submitted by a nominating committee if established by the Legislature, subject to Senate confirmation and subsequent retention election;
- establishing as the school finance equity standard substantially equal access to similar revenues per pupil at similar tax rates and allowing up to 15 percent of students to be in districts outside the equalized system;
- authorizing the Legislature to allocate up to one-half of the capital gains of the Permanent School Fund to the Available School Fund;
- allowing state ad valorem taxes to support public education;
- limiting the Permanent University Fund and Available University Fund to the University of Texas at Austin, Texas A&M University at College Station, and Prairie View A&M University, with all other campuses under a higher education capital fund with an increased endowment;
- eliminating the revenue dedication for any voter-approved personal income tax to education and reduction of school property taxes;
- allowing county voters to decide by local option which officers to elect;

- requiring all local general-obligation bond debt to be approved by local voters;
- eliminating specific requirements for home equity loans;
- limiting marriage to heterosexual unions for community property purposes;
- authorizing the Legislature by two-thirds vote to submit to the voters whether to call a constitutional convention to revise all or part of the constitution; and
- making no changes to the existing Bill of Rights.

Supporters said HJR 1/SJR 1 would streamline and modernize the antiquated Texas Constitution. The constitution has been amended 377 times since 1876, and the proposed new version would trim outmoded restrictions and unnecessary detail best left to statute. It would cut the constitution from 376 sections and 90,000 words to 150 sections and 19,000 words, leaving a much clearer, more easily understood outline of the duties and powers of the state government.

The new constitution would remove 19th-century limits on the governor's authority, allowing the chief executive to appoint a cabinet of department heads, as the president and many other state governors do. The voters expect the governor to run the executive branch, but the current constitution makes the Texas governor one of the weakest in the nation, with almost no direct control over administration and policy-making. A unified top appellate court would be more efficient, and the governor should be able to choose the best judges possible, subject to Senate confirmation and voter approval.

Opponents said if the constitution needs revision, the Legislature could submit individual amendments allowing voters to review the specifics of each proposed change rather than forcing them to take or leave a single revision. The proposed new constitution would radically increase the governor's authority and remove the people's right to elect members of the executive and judicial branches. The proposal undermines its purpose of presenting a general outline for state government by needlessly including controversial details such as limiting marriage only to heterosexuals. The Legislature could revise or delete archaic and duplicative provisions of the constitution without sweeping away decades of legal interpretation and necessary checks on executive authority.

Other opponents said that while a new constitution is needed, the Legislature should not rewrite it in a single session. A constitutional convention could concentrate solely on constitutional revision, or the Legislature could undertake a revision effort in stages. As in the 1970s revision effort, a broad-based citizen's commission should first hear public testimony throughout the state, then, with expert assistance, draft a proposed constitution that could serve as a nonpartisan basis for any revision efforts.

Texas Religious Freedom Restoration Act

SB 138 by Sibley, et al.
Effective August 30, 1999

SB 138 prohibits a government agency from substantially burdening a person's free exercise of religion unless the agency can demonstrate that it has acted due to a compelling governmental interest and has used the least restrictive means of furthering that interest. In determining whether an interest is compelling, a court must give weight to the interpretation of the "compelling interest" test in federal case law. The bill defines "free exercise of religion" as an act, or a refusal to act, substantially motivated by sincere religious belief. Persons who successfully assert that the government has burdened their free exercise of religion may receive declaratory relief, injunctive relief, compensatory damages, and reasonable attorney's fees and costs, but not exemplary damages. Compensatory damages are limited to \$10,000 for each entire, distinct controversy, regardless of the number of people affected by the government's action. To bring an action, a person must provide written notice by certified mail 60 days before bringing a claim. Notice is not required in actions for declaratory or injunctive relief when the government action that threatens to burden free exercise of religion is imminent and the person does not know about the action in time to provide notice.

A compelling interest would be assumed when governmental actions in question applied to persons in the custody of a county, the Texas Youth Commission, the Texas Department of Criminal Justice, or a facility under contract with a corrections department. The presumption could be rebutted. In these cases, use of the least restrictive means also would be presumed unless rebutted. The bill explicitly states that it does not diminish the authority of a municipality to adopt or apply laws or regulations on zoning, land-use planning, traffic management, urban nuisance, or historic preservation.

Supporters said religious freedom is a fundamental right upon which this country was founded, and SB 138 would restore religious freedom to the status that it had for the 30 years before the 1990 U.S. Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872. Earlier Supreme Court decisions had established that a state must have a compelling interest in order to take actions burdening the exercise of religion. That standard is an appropriate means of judging state impact on the free exercise of religion. It would not result in any conflicts between religious practices and state actions that were not already present before the *Smith* decision.

This legislation would follow the holding in *Smith* that requires states to legislate exceptions to generally applicable laws in order for the compelling interest standard to apply. By creating a broad exception for those laws that substantially burden the free exercise of religion and by providing an opportunity for the government to be informed

of, and to cure, such burdens, SB 138 would ensure the reinstatement of the compelling interest test. Congress sought to accomplish the same purpose by enacting the federal Religious Freedom Restoration Act in 1993, but the U.S. Supreme Court determined, in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), that the federal law could not apply to the actions of state and local governments. SB 138 would restore the federal policy and apply it to state and local authorities.

SB 138 would not allow people to use religious freedom to overturn or stop the enforcement of current laws. It is a carefully structured bill tracking certain language in the federal law, which still applies at the federal level. SB 138 would ensure that certain situations do not fall under the act. The notice provisions, while not included in the federal law, would be an improvement to allow agencies and local governments an opportunity to remedy a burden on the free exercise of religion.

Opponents said SB 138 was a “religious superiority act” that was not needed under current law. While one can argue that the *Smith* case changed the legal standards related to scrutiny of religious freedom claims, the actual holding in *Smith* should be allowed to stand on its merits. The case plainly stated that religious beliefs are protected absolutely; however, religiously motivated conduct is subject to generally applicable state laws that are neutral on their face toward religion. Overriding this standard and reinstating a compelling interest standard could make it harder to create and enforce generally applicable laws.

This bill would single out religious beliefs as opposed to other sincerely held beliefs and, thus, would be unfair to people who do not have religious beliefs. It would create special rights for people who are religiously motivated and could lead to additional entanglements between church and state.

Other opponents said creating the presumption that acts performed by a corrections facility do not substantially burden the free exercise of religion could be abused to take more rights away from prisoners. This could have a detrimental impact on needed programs that provide religious ministry to prisoners.

The **HRO analysis** appeared in the May 17 *Daily Floor Report*.

Contingency fee restrictions and HUB contracting requirements

SB 178 by Ratliff, et al.

Effective September 1, 1999

SB 178 codifies many provisions found in Article 9 of the general appropriations act, including provisions relating to historically underutilized businesses (HUBs). It also adds new requirements for the state's HUB program and places new restrictions on contingency fee contracts for legal services entered into by the state.

SB 178 prohibits an agency from paying a fee or reimbursing expenses under a contingency fee contract for legal services unless the payment is appropriated specifically by the Legislature or, if the Legislature is not in session, the payment is approved by the Legislative Budget Board (LBB). Payments may not be made until final arrangements have been made to deposit the recovered funds and the auditor has examined the billing and expense statement provided by the contracting attorney or firm.

Before a state agency or the attorney general may enter into a contingency fee contract for legal services, the agency's governing body or executive officer must approve the contract. A contingency fee contract may be entered into only if the agency finds that there is substantial need for the legal services, that the services cannot be performed adequately by attorneys employed by that agency or another agency, and that the services cannot be obtained reasonably on an hourly basis because funds have not been appropriated for such services. For contracts for which the estimated fee is more than \$100,000, the LBB must agree with the agency that funds are not available to pay for hourly legal services.

Any contingency fee contract for legal services of more than \$100,000 must require the contracting attorney or firm to keep current time and expense records, make those records available for inspection, and provide a complete statement at the conclusion of the matter for which the services were contracted. The contract must set out specific requirements, including the determination of the contingency fee using a base hourly fee times a multiplier based on the difficulty of the case, the amount of expenses, the risk involved, and the expected delay in recovery.

New HUB language in SB 178 requires state agencies to set subcontracting requirements for contracts worth more than \$100,000 whenever subcontracting opportunities exist. Agencies must include a HUB subcontracting plan in any such project, and an agency may not award a contract to a prospective contractor whose bid does not include such a plan. All contracts will be reviewed to determine if the contractor made a good-faith effort to meet subcontracting participation levels established in the contract.

The bill establishes a HUB mentor-protégé program; requires every state agency with a budget exceeding \$10 million a year to have a designated HUB coordinator; requires the General Services Commission (GSC) to design HUB forums to allow HUBs to deliver presentations to state agencies; requires GSC to develop a HUB orientation package; allows GSC to approve the use of local government HUB certification programs; establishes HUB size standards; requires GSC to report annually on its education and training efforts; and allows the LBB to transfer all or part of an agency's purchasing authority for failure to meet HUB goals.

Among the Article 9 provisions codified by SB 178 are those related to purchase of insurance by a state agency, agency review of existing rules, preferences to Texas products and U.S. automobiles, office space regulations, restrictions on the acquisition of real property, and retention of mineral rights on state sold lands.

Supporters said SB 178's restrictions on contingency fee contracts would help to eliminate questions about the appropriateness of reimbursement paid to private attorneys working for the state. The 1998 settlement of the state's lawsuit against the tobacco industry illustrated the difficulty under current law of paying large sums of money to private attorneys. While that settlement would not be affected by this bill, SB 178 would alleviate future conflicts by establishing a clear approval process and setting out specific requirements for such contracts. The bill also would ensure that the Legislature, not the executive or judicial branch, retains full control over the appropriation of state funds.

This legislation is not intended to punish the attorney general for the conflicts that arose over the tobacco settlement, but it would apply to all units of state government. It would not prohibit or limit the use of contingency fee contracts when necessary to pursue litigation but would require only an appropriate exploration of alternatives and specific procedures to ensure that such a contract was suited to the underlying litigation. The bill would not place undue restrictions on private attorneys entering into contracts with the state but would ensure that they did not receive a windfall at taxpayers' expense.

The HUB program has been successful in promoting the use of disadvantaged businesses in state contracting, thus giving them the opportunity to compete on their own for other government and private-sector business. The program should be continued because there still is a great disparity between the percentage of businesses owned by minorities and women and the percentage of these groups in the general population. Changes proposed in SB 178 would strengthen the HUB program by increasing the outreach and education efforts of GSC and the state. These efforts would promote the certification of additional HUBs and, by providing technical help in preparing bids and providing opportunities for HUBs to present their skills to state agencies, would improve HUBs' chances of receiving state contracts. SB 178 would provide for better identification of the HUB subcontracting

goals that should be established for each major contract and for better monitoring of the outreach, selection, and participation of HUB subcontractors in these major contracts.

Opponents said SB 178 would limit the necessary use of contingency fee contracts to pursue certain litigation when circumstances call for the use of private attorneys. In certain situations, attorneys on staff for the state may not have the specialized skills and background to pursue complex litigation that attorneys in private practice may have, or it may be more cost-effective to use a contingency fee contract. This bill could make it more difficult to enter into such a contract because of the many restrictions it would place on the attorneys agreeing to such a contract. These restrictions, which are not standard, could deprive the state of the ability to pursue certain cases that could result in recovery of funds on behalf of state taxpayers.

The new HUB requirements in SB 178 would create burdens that could cause many contractors to avoid submitting bids on state contracts. This bill would increase significantly the amount of bureaucracy in the HUB program by requiring examination of subcontracting opportunities on every contract worth more than \$100,000. The outreach and education efforts were proposed to reverse a significant decrease in the number of state-certified HUBs over the last two years, but most of that drop was the result of moving from a self-certification process to one that required HUBs to submit documentation for certification.

Other opponents said all businesses should have to compete for state business on an equal footing. There should be no participation goals in state contracting that award contracts to certain businesses. The only contracting goal should be to obtain the best qualified bidder submitting the lowest bid.

Notes. Restrictions on contingency fee contracts in SB 178 are substantially similar to those in **SB 113** by Fraser and Ratliff, which passed the Senate, but died in the House State Affairs Committee. The new HUB language not previously included in Article 9 was included in **HB 3032** by Oliveira, which passed the House, but died in the Senate.

The **HRO analysis** of HB 3032 appeared in Part One of the May 11 *Daily Floor Report*. The digest of SB 178 appeared in the May 17 *Daily Floor Report*.

Continuing the Department of Public Safety

SB 370 by Brown
Effective September 1, 1999

SB 370 continues the Department of Public Safety (DPS) until September 1, 2009, and requires various changes on the part of the agency and its oversight body, the Public Safety Commission. Major issues addressed in the law include the duties of the DPS director; creation of an audit and review office and an internal affairs department; providing a new framework for employee relations; requiring the commission to establish grievance procedures; appointing special Texas Rangers from among ranger retirees; establishing rules for disposition or use of seized and forfeited assets; allowing renewal of driver's licenses and personal identification certificates by telephone, the Internet, or other electronic means; authorizing DPS to require license applicants to provide their social security numbers only if required by federal law; and adding requirements for commercial vehicle inspections and vehicle emissions citations. SB 370 also raises the annual fee for inspection of a motor vehicle from \$10.50 to \$12.50 and requires DPS to set the fee each year for an initial two-year inspection at no less than \$21.75, replacing the previous flat fee of \$19.75.

Supporters said the Public Safety Commission should remain a three-member body, which is more efficient and effective. The new audit and review and internal affairs offices would improve the agency's internal oversight. Current oversight programs are inadequate and lack independence and accountability. DPS needs a formal procedure for handling employee grievances. The bill would formalize and make more consistent the current grievance process and would make it known to all employees. Current oversight of seized assets or funds is inadequate, and the bill would improve these procedures.

Opponents said the size of the Public Safety Commission should be increased to enhance regional representation and better reflect the diversity of the state's population. The internal oversight functions proposed by this bill should remain outside the chain of command and not under the DPS director. The bill should require all personnel complaints to be investigated by the internal affairs office. Seized assets should be subject to oversight by an independent auditor.

Notes: The House added several floor amendments that the conference committee removed. These amendments would have:

- increased the Public Safety Commission from three to five members;
- required DPS to buy Austin's Robert Mueller Airport and operate it for general aviation;

- established a code of conduct for DPS officers, including rules to prevent verbal and physical abuse of citizens;
- prohibited DPS from selling information on individuals' driver's licenses;
- prohibited DPS from providing information about a person's concealed handgun license; and
- prohibited DPS from using racial profiling in enforcing traffic laws.

The **HRO analysis** appeared in the May 18 *Daily Floor Report*.

Revising open records laws

SB 1851 by Wentworth, et al.
Effective September 1, 1999

SB 1851 makes numerous changes to the Public Information (Open Records) Act (Government Code, chapter 552). It shortens from 60 days to 45 days the time in which the attorney general must render an open records decision and prohibits requests for reconsideration. A request for an opinion from the attorney general must be made within 10 days of receiving the open records request or the information is deemed public, unless there is a compelling reason to prevent disclosure. Governmental bodies must post information about the Public Information Act in their offices, and an open records steering committee will advise the General Services Commission about open records policy. It also clarifies venue for actions against governmental bodies for violations of the open records law or to compel disclosure of information.

SB 1851 allows governmental bodies to charge for inspection of documents when the documents are more than five years old, would take up more than six boxes, and would take more than five hours to assemble. If a requestor owes more than \$100 for previous requests, a governmental body may require the requestor to post a bond to cover the costs of any new requests before providing additional information. A governmental body may deny multiple requests by the same person for the same information. The law establishes two exceptions to the open records law: for negotiations to encourage economic development during the pendency of the negotiations and for information on crime victims, if the victim requests not to have certain information disclosed.

The law limits the open records exception for litigation to exclude settlement negotiations and applies only to litigation that is pending or reasonably anticipated at the time the request is made. The trade secret exception is now limited to information that, if released, would cause substantial competitive harm to the person from whom the information was obtained. The audit working paper exception no longer applies to information that is contained in an audit working paper but also is found in another document.

Disclosure of any information related to the judiciary is governed by rules adopted by the Texas Supreme Court.

Supporters said SB 1851 was a carefully constructed compromise and the result of more than a year of work by the Senate Interim Committee on Public Information. Its provisions would limit many of the abuses of the open records system, cut down on the time it takes to receive information, and require the disclosure of additional information. The bill also would allow governmental bodies to contain some of the highest costs of open records production by allowing them to charge those who inspect information that

takes a significant amount of time and effort to compile and by requiring those who owe money for previous requests to post a bond to pay for new requests before receiving the information. The balanced approach of the bill would provide something for everyone on both sides of the open records debate and would ensure continued compliance with the law.

The new exceptions to the open records laws were crafted narrowly to apply only for a limited time or only upon request of the person whom the information concerns. Other changes to the exceptions would limit their applicability to situations in which disclosure of information causes actual harm. Allowing the judiciary to set its own rules for public information disclosure is necessary because of the unique nature of the judiciary. Only those inside the process can best determine which information may be released as strictly administrative information and which information would compromise the nature of the deliberative process of deciding cases.

Opponents said this bill would create new exceptions for economic development negotiations and information on crime victims who receive money from the Crime Victims Compensation Fund. Both types of records relate to expenditure of public funds and always should be disclosed to the public. Allowing the judiciary to write its own rules with no oversight would make it impossible for the Legislature to determine if such rules provide access to public information. Shortening the time in which a governmental body must make a request for an open records opinion could increase costs by requiring additional staff for the Attorney General's Office to evaluate requests quickly. Civil penalties should be added for violations of the Public Information Act, as recommended by the interim committee, because the only way to enforce the act now is by criminal prosecution of government officials, which is used rarely.

The **HRO analysis** appeared in Part Two of the May 20 *Daily Floor Report*.

Health and Human Services

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Medicaid for children formerly receiving TANF benefits

HB 820 by Naishtat, et al.

Effective June 19, 1999

HB 820 requires the Texas Department of Human Services (DHS) automatically to review a child's eligibility for Medicaid if the child stops receiving federal Temporary Assistance for Needy Families (TANF) benefits. Based on the review, DHS may grant to children who appear to be eligible a provisional one-month eligibility. DHS also must promote continued Medicaid coverage through client education and notification.

The act takes effect only if specific appropriations are made in the state budget. (Rider 19 in Article 2, Special Provisions, in HB 1 by Junell, the general appropriations act for fiscal 2000-01, directs the Texas Department of Health, which administers the acute-care portion of the Medicaid program, to pay the costs of children found eligible through DHS' review out of appropriated funds.)

Supporters said HB 820 would ensure that children in low-income families who get off of welfare would continue to receive the health care coverage through the Medicaid program to which they are entitled. When most parents find a job, they think that they lose all government benefits at the same time as they lose cash assistance. Therefore, they do not show up at their next scheduled eligibility review, despite the fact that their incomes usually are still low enough to qualify their children for Medicaid coverage.

Continued coverage would help parents leave welfare and move into self-sufficiency by giving them assistance to obtain needed health care services for their sick or injured children. Most parents who are leaving welfare usually obtain minimum-wage jobs that provide little or no health benefits.

Enrolling former TANF children into the Medicaid program would not expand the program but simply would provide Medicaid to children who never should have lost it in the first place. Also, the state would pay only about 39 percent of the total cost, with the rest picked up by the federal government.

Opponents said the state should not spend a potential \$18.6 million in fiscal 2000-01 on automatically enrolling children who may not need Medicaid assistance. If parents are unaware of possible Medicaid eligibility, a lower-cost education campaign could be implemented to increase parental awareness rather than automatically enrolling their children. Parents then could choose to enroll their children if they wanted the coverage.

The **HRO analysis** appeared in Part One of the May 6 *Daily Floor Report*.

Endowment for county and public hospital indigent care costs

HB 1161 by Junell, et al.

Effective August 30, 1999

HB 1161 establishes the Tobacco Settlement Permanent Trust Account; a lump-sum trust account; two 11-member advisory committees; and Texas Department of Health (TDH) responsibilities to collect and certify data on unreimbursed health-care expenses of political subdivisions.

Trust account. The permanent trust account will include money paid into the account in accordance with the agreement between the state and the counties and public hospitals that intervened in the settlement of the lawsuit between the state and the tobacco industry (*Texas v The American Tobacco Co, et al.*, No 5-96CV-91). The corpus will have to remain in the account at all times. The account's money and other assets will not be part of the state's general funds. The comptroller, with advice from an 11-member Tobacco Settlement Permanent Trust Account Investment Advisory Committee, will manage account investments.

On certification by TDH, the comptroller will have to distribute annually the net earnings of the account to each eligible political subdivision through a formula specified in the agreement between the state and the intervening counties and hospitals.

TDH data collection and certification. Each political subdivision will have to submit to TDH information relating to its unreimbursed health-care expenses. TDH will use this information and the formula specified in the agreement to certify to the comptroller the share of the annual distribution to be paid from the account to each political subdivision.

TDH activities and rulemaking will be subject to the approval of a Tobacco Settlement Permanent Trust Account Administration Advisory Committee. TDH rules may provide for regular, randomly selected audits of the information, for handling disputes relating to submitted information, including the imposition of a reasonable monetary penalty on a political subdivision found to have overstated its unreimbursed expenses.

Lump-sum trust account. This account refers to the lump-sum trust account established under the agreement between the state and the hospital districts and counties. TDH is authorized to collect and certify unreimbursed health-care expenditure data for the pro-rata lump-sum distributions to be made in 2000 and 2001 in accordance with the agreement.

Supporters said HB 1161 would codify the settlement agreement between the state and

the counties and hospital districts that intervened in *Texas v. The American Tobacco Co., et al.* In accordance with that agreement, \$300 million was deposited to the lump-sum account and distributed to counties and hospital districts in January 1999, and \$150 million will be deposited and distributed over the next two years. HB 1161 would place the remaining \$1.8 billion in a permanent fund for payments made by the tobacco industry through 2003, and the net earnings would be distributed to public hospitals and counties in perpetuity in proportion to their unreimbursed health-care expenses.

The state would assist in managing, investing, and distributing the money, but final control would rest with the hospital districts and counties that provide most of the indigent health care in Texas and that successfully litigated for a share of the tobacco settlement.

HB 1161 rightfully would assign over half of the membership of both advisory committees to those who are among the top 12 providers of indigent health care in Texas, who together provide about 95 percent of all indigent health care in the state. Because small rural hospitals do not carry the large and often regional burden of financing indigent care that the larger hospitals carry, they should not be granted a specific seat on advisory committees that determine the management and distribution of these reimbursement funds.

Opponents said at least one seat on the administration advisory committee should be allocated specifically for rural hospitals, because this committee would make important decisions on what constitutes unreimbursed health-care expenses and how this large sum of tobacco settlement money would be distributed.

Even though small rural hospitals do not provide the overall volume of care that the large urban public hospitals provide, they do provide a comparable percentage of indigent health care in relation to their total patient revenues, which can make financing difficult for other necessary hospital services.

Notes: The final version of the bill includes the appointment by the comptroller for each advisory committee a representative of a public hospital or hospital district located in a county with a population of 50,000 or fewer or a representative of a public hospital owned or maintained by a city.

The **HRO analysis** appeared in Part One of the April 20 *Daily Floor Report*.

New standards for indigent health care

HB 1398 by Coleman, Farabee, et al.

Effective September 1, 1999

HB 1398 amends the Indigent Health Care and Treatment Act to change eligibility standards for indigent patients to be treated by public hospitals and counties. It newly imposes minimum eligibility and service standards on hospital districts to match those required of public hospitals and counties. It also redefines mandated services and authorizes the provision of optional services for these patients.

The new law links the minimum-income eligibility requirements for counties, public hospitals, and hospital districts to 25 percent of the federal poverty level (FPL) instead of to eligibility requirements of the federal welfare program. Minimum standards must be at least 17 percent of the FPL for calendar year 2000 and 21 percent for calendar year 2001. Counties may use a less restrictive eligibility standard and may credit toward state assistance the services they provide to eligible individuals whose income is at or below 50 percent of the FPL.

Counties must provide basic health-care services and may provide optional services. Basic services are those previously defined as “mandatory,” with the addition of primary and preventive services such as immunizations and medical screening services. A public hospital or hospital district must endeavor to provide basic services only to the extent that it is financially capable of doing so.

Under previous law, a county was eligible to receive state financial assistance once it had spent 10 percent of its general revenue tax levy (GRTL) on mandatory indigent health-care services for eligible individuals. HB 1398 increases state assistance to counties by decreasing the threshold to 8 percent of the GRTL and by providing assistance for 90 percent of a county’s expenditures over the new threshold.

The Texas Department of Health (TDH) must study the costs and funding associated with providing basic health-care services. The agency also must study the feasibility of requiring or permitting the issuance of a uniform identification card for eligible residents and must recommend a formula to replace the threshold expenditure percentages used to establish access to state assistance.

Among many other measures, HB 1398 also:

- requires all counties to report to TDH their provision of indigent health-care services, regardless of their intent to seek state assistance;
- amends the Tax Code to allow counties to make tax-rate adjustments until January 1,

- 2002, for their enhanced indigent health-care expenditures;
- establishes a state teaching hospital account to pay for indigent health care;
 - establishes a tertiary care account and related requirements to reimburse facilities for uncompensated tertiary medical care (trauma care, burn treatment, and other services) and stabilization services;
 - establishes a regional health-care delivery system pilot program; and
 - amends telemedicine laws to include non-urban areas with small hospitals and clinics associated with public hospitals or federally qualified health centers as participants in telemedical consultations and reimbursement and directs TDH to promulgate telemedicine policies with the help of an advisory committee.

Supporters said HB 1398 would take important steps in addressing long-term concerns about the provision of indigent health-care services in Texas. It would not establish a new government program, but would help resolve problems in an existing program that relies on cooperation between public and private entities. It would limit state liability for financial assistance to a sum-certain appropriation in the state budget.

Services provided under the Indigent Health Care and Treatment Act are considered the basic safety net for uninsured, low-income sick or injured Texans who are ineligible for any other programs. State efforts to increase health benefits to children through the Texas Healthy Kids Corporation or the CHIP program would do little to help defray counties' indigent care expenses, which are caused predominantly by illnesses and injuries to middle-aged and elderly adults.

HB 1398 primarily would increase incentives, not mandates, for counties to provide indigent health care. The amount and type of indigent health care being provided in Texas is inconsistent, and the burden of care is distributed unevenly, creating conflicts between counties and hospitals and inequities for Texas residents. Many of the bill's provisions would reduce conflicts between counties and hospitals over reimbursement for indigent care.

This bill would streamline eligibility determination by linking eligibility to a specific percentage of the FPL and would maintain eligibility standards at a constant minimum level over time. The current system, tying eligibility to income limits under the federal welfare program, has reduced the number of indigent individuals who can receive county coverage for needed health-care services and has increased the number of uninsured individuals whom health-care providers treat without compensation.

By setting minimum eligibility and service standards instead of requiring cross-county uniform standards and by allowing the provision of optional services, the bill would enable counties to tailor their programs to meet the demand for indigent health care in a

more cost-effective manner.

State assistance would not be provided to hospital districts, which are established for the sole purpose of providing health care and reflect an area's choice to provide health care for their indigent populations. However, the bill would help relieve taxpayers in areas supporting public tertiary-care facilities and would sustain the operations of hospitals that carry the regional burden of providing unreimbursed tertiary care.

Opponents said the state should not assume more responsibility for paying for indigent care, nor should it place more requirements on counties and public hospitals. Health care is provided best through the private market and not through government programs, which distort the market and increase costs.

The state does not need to be more involved in indigent health care. The 76th Legislature already has considered legislation to improve the availability of health-benefit coverage and health services, such as through the new Children's Health Insurance Program and by establishing endowment funds that could help provide indigent care through medical schools and other programs.

Increases in services and eligibility standards should be optional, not mandatory. The state should not tell local governments and hospitals how to take care of the residents of their service areas.

Other opponents said mandatory services and eligibility standards should be made uniform across the state. A person's access to needed health care should not depend on where that person lives. Uniformity of services and eligibility standards would ensure that every county, public hospital, and hospital district upheld the same responsibility for indigent care. Inconsistencies and variances in indigent health-care programs create a hodgepodge of a program intended to be the state's safety net for the uninsured, and they exacerbate reimbursement problems between local entities.

Hospital districts and public hospitals also should be able to receive state assistance. The current law unfairly helps counties that have done little to help indigent residents in the past, and it does nothing for communities that have created hospital districts or public hospitals and now face additional costs because of state mandates to provide care.

The **HRO analysis** appeared in Part One of the May 5 *Daily Floor Report*.

Requiring employee health plans to include non-network option

HB 1498 by Janek, et al.

Effective September 1, 1999

HB 1498 requires each health maintenance organization (HMO) in an HMO-only employee health-benefit plan to offer a non-network plan to eligible employees at the time of enrollment and at least annually. The HMOs in an HMO-only plan may agree to allow only one of the HMOs to offer the non-network plan. HB 1498 applies the same conditions to other kinds of limited-provider networks. Non-network plans are not required for health-benefit plans offered by employers with fewer than 50 employees or for group model HMOs that provide the majority of their services through nonprofit group medical practices affiliated with accredited, state-supported medical schools.

The non-network plan can be a point-of-service contract, a preferred provider organization plan, or any other coverage arrangement that allows an employee to see physicians outside of the HMO network. The point-of-service contract can be based on an arrangement between the HMO and another insurance carrier to provide out-of-network health benefits on an indemnity basis to the employee. Other coverage agreements can include contracts between the HMO and a group hospital service corporation for the HMO to pay for out-of-network benefits.

Employees choosing the non-network plan must pay the premium plus any reasonable administrative cost imposed by the employer for providing the plan. Both the premium and copayment can be higher for the non-network plan than for the network plan, but the premium must be based on its actuarial value.

The law allows an insurance carrier and an HMO to contract with each other to offer blended contracts with a mixture of indemnity and HMO benefits. These blended contracts must be approved by the Texas Department of Insurance.

An HMO may offer its own point-of-service plan and pay for the indemnity benefits itself as long as the cost of such a plan does not exceed 10 percent of the total medical costs for all plans offered by the HMO and the HMO meets net-worth requirements for similar point-of-service plans. If the cost exceeds 10 percent, the HMO must stop offering its own point-of-service plans or obtain an insurance carrier license.

Supporters said that people should not be forced to give up their personal doctors or specialists when they take a new job with an employer whose health-benefit plan offers only HMO plans. HB 1498 would give employees more choices and control over their own health care.

The bill would not create a traditional mandated benefit because employees would bear any additional costs through higher premiums and copayments. The employee rightfully should pay for the greater freedom that comes with a non-network plan, but the costs must be reasonable and actuarially supported. Since the bill would apply only to large employers, enough employees would select the non-network plans to defray additional administrative costs to the employer and the HMO.

Mandated benefits are necessary because consumers cannot know all of their future ailments at the time they choose their coverage. The state must establish the basic coverage that should be included in all health-insurance policies and plans. Bad insurance with no choices is not much better than no insurance at all. Mandated benefits assure consumers that they will receive at least minimum standards of coverage regardless of what policy or plan they choose. Claims of higher premiums due to mandated benefits have not been proven conclusively.

Opponents said the bill would create a mandated benefit that would force HMOs and other insurers to offer certain benefits regardless of market conditions. These mandated benefits ultimately would result in higher premiums. Fewer employers will offer health-benefit plans if more mandates are imposed and premiums continue to rise. This would result in more uninsured Texans and would defeat the purpose of bills like HB 1498.

Health benefit coverage should be based on the free market. Employers and employees should be free to contract for whatever health benefits they wish without state-mandated benefits driving up costs. If employees do not like the benefits packages offered by their employers, they can always change jobs or pay for their own insurance.

Few employees would choose the non-network plan because of the higher premium and copayments, and those who did would not be able to afford to pay high enough premiums and copayments to cover the entire cost of offering the non-network plans to every employee. The HMO and the employer would have to absorb these remaining administrative costs, which would translate into higher premiums for all employees and fewer health-benefit plans being offered by employers.

The **HRO analysis** appeared in Part One of the May 4 *Daily Floor Report*.

Permanent funds for health care

HB 1676 by Junell, et al.
Effective August 31, 1999

HB 1676 establishes five endowment funds in the state treasury to be capitalized with \$475 million received from the tobacco lawsuit settlement. The money in the funds will be in dedicated accounts within the general revenue fund, and fund investments will be managed by the comptroller. The funds also can be used to pay any amount of money that the federal government may decide to recoup from states.

The permanent fund for **Tobacco Education and Enforcement** will receive \$200 million. The fund earnings can be appropriated to the Texas Department of Health for programs to reduce the use of tobacco products in Texas, including smoking cessation, public awareness programs, enforcement of sales and distribution laws, and specific programs for communities traditionally targeted through advertising by the tobacco industry.

A permanent fund for **Children and Public Health** will be created by a transfer of \$100 million. The earnings of the fund can be appropriated to TDH for developing and demonstrating cost-effective prevention and intervention strategies for improving health outcomes for children and the public. Local communities also can receive grants to address public health priorities.

A permanent fund for **Emergency Medical Services and Trauma Care** will be established by a transfer of \$100 million. Its earnings can be appropriated to TDH to provide emergency medical services and trauma care, either by establishing programs or by awarding contracts or grants to other entities or political subdivisions.

A permanent fund for **Rural Health Facility Capital Improvement** will be established by a transfer of \$50 million. Its earnings can be appropriated to the Center for Rural Health Initiatives to make grants or loans to a city, county, hospital district, or hospital authority that owns or operates a hospital in a rural county. The grants or loans can be used only for new construction, capital improvements, or capital equipment expenditures for public health facilities. A rural county is defined as having a population of 150,000 or less or having an area that the federal census bureau does not delineate as urbanized.

A permanent fund for **Community Hospital Capital Improvement** will be established by a transfer of \$25 million. The available earnings can be appropriated to TDH to provide grants and loans to public or nonprofit community hospitals with fewer than 125 beds.

Supporters said HB 1676 would create permanent endowments to provide a stable base

of funding for long-term health care needs in Texas. The creation of these funds would not bind the Legislature to future appropriations. The Legislature could increase or decrease state appropriations to these programs as needed.

Tobacco use and its impact on the health of Texans most likely will be a long-term problem. Establishing an endowment, expected to generate about \$11.2 million in interest per year, is the best use of the tobacco windfall for tobacco-cessation and education activities. It would create a source of permanent funding instead of a single “blitz” over the next four years. Smoking cessation and prevention campaigns can be tested at the local level. If effective, they can be expanded to other areas of the state. To appropriate \$200 million for a statewide campaign over the next four years, as advocated by the American Cancer Society and others, would amount to over 200 percent more funding than TDH has ever spent on these kinds of activities.

Opponents said at least \$200 million of the tobacco settlement receipts should be used to pay for a statewide tobacco prevention campaign over the next four years. This campaign was specially designed by a coalition of experts, and its expense is partially related to the high cost of reaching children through television.

A statewide campaign is needed to reduce smoking rates among children and adults. Pilot projects that focus on single areas or populations would not be as successful as a statewide campaign, due to the pervasive use and advertising of tobacco in our culture. It is only fair and right that a sizeable portion of this biennium’s tobacco receipts would go toward funding tobacco cessation and prevention programs. The state’s case in the tobacco lawsuit was based on the state’s expense in treating diseases caused by tobacco use.

The **HRO analysis** appeared in Part One of the April 20 *Daily Floor Report*.

Continuing the Health and Human Services Commission

HB 2641 by Gray, Bosse, McCall

Effective September 1, 1999

HB 2641 continues the Health and Human Services Commission (HHSC) until September 1, 2007, and:

- expands the authority of the commission over Texas health and human services (HHS) agency activities;
- requires HHSC to appoint a medical director;
- expands the Guardianship Advisory Board's membership and duties;
- transfers the Empowerment Zone and Enterprise Community programs from HHSC to the Texas Department of Economic Development; and
- places a moratorium on the expansion of Medicaid managed care, subject to the outcome of various evaluations, and imposes other program requirements.

HB 2641 newly authorizes the commissioner to hire HHS agency executive directors with the concurrence of each agency's policymaking board and to direct and assign directors' activities. The commissioner's authority extends to an agency's allocation of resources; personnel and employment policies; contracting and purchasing policies; location of agency facilities; coordination with other state agencies; and adoption or approval of payment rates. HHSC specifically is responsible for planning and managing the use of all federal funds among HHS agencies. Also, HHS agencies may not propose rules without first notifying the commission.

The law assigns many new responsibilities to the commission, including:

- planning and directing the Medicaid program, including Medicaid managed care;
- coordinating and overseeing the agencies that administer child care, Temporary Assistance for Needy Families, and Food Stamp Employment and Training programs;
- meeting new statewide, regional, and community-based requirements relating to location of offices, support systems, and performance objectives;
- developing strategic plans, security standards, and management policies for HHS information systems and appointing an information resources advisory committee;
- adopting criteria to determine whether agency rules discourage marriage or encourage divorce;
- developing and implementing a Texas Integrated Enrollment and Services plan;
- conducting a subacute care pilot project;
- evaluating mental health and substance abuse services, health regulatory programs, and the benefits of consolidating support services among HHS agencies; and
- creating a statewide coordinated system for HHS agencies providing client

transportation.

Supporters said HB 2641 would give HHSC the authority it needs to do the job it was created to do eight years ago. Recent findings by the Sunset Advisory Commission and by the state auditor mirror the findings of the first Texas Performance Review in 1991, which found HHS services fragmented and uncoordinated.

The authority structure set up in this bill would create a readily identifiable, direct chain of command with the commissioner at the top, fully empowering the commissioner to accomplish HHSC's assigned mission. Public input would be maintained through individual agency policy boards, through the legislative process and oversight, and through the governor, who appoints the commissioner.

Giving HHSC a governing board, as some suggest, would not increase public input because the board would have little to rule on, since HHSC focuses on integrating cross-agency business functions, not on policymaking.

The bill would improve the state's management of federal funds by giving HHSC greater authority over agencies' federal funding plans. The Sunset Commission found that federal funding often spans multiple state agencies and that many local entities are not aware of available federal funding.

Many HHS agencies, including the Commission on the Blind, claim to serve unique population bases. That does not mean, however, that the state could not realize further efficiencies by granting HHSC greater authority over agency business matters — for example, in areas such as buying supplies, contracting with providers, and maximizing funding sources. Under HB 2641, the Commission for the Blind, like all other HHS agencies, would remain responsible for policymaking and for delivering appropriate and needed services to their clientele.

Creating an HHS policy council or division similar to the Criminal Justice Policy Council would not achieve what its proponents advocate. Planning the delivery and administration of HHS requires a far more complex string of assumptions and empirical data than does predicting the growth in prison populations or youth-detention facilities. Also, even empirical data can be manipulated to support a particular viewpoint.

Opponents said giving one person or agency total control over the work of more than 60,000 state employees would not be wise, feasible, or efficient, nor would it be consistent with the Legislature's historical interest in maintaining oversight and control over agency functions. By changing commission leadership, this bill could cause abrupt, wholesale shifts in programs and policies. The rulemaking authority of agency boards

would be undermined seriously if the executive director were not directly accountable to them.

HHSC should not be given additional say over agency rulemaking. This would decrease valuable public input into the policymaking process and could be used by HHSC to set policy instead of concentrating on coordination of administrative functions.

No mechanism in this bill would ensure formalized ongoing public comment on Medicaid managed care or on rules proposed by the commission. HHSC should be given a policy board to govern the commission's activities and to receive public input, or another mechanism for public input should be put in place.

Other opponents said HHS functions require a distinct entity charged with formulating public policy oversight and options, as the Criminal Justice Policy Council does for criminal justice. Such an entity would bring the influence of science and hard data to bear on public policy decisions. Also, the Commission for the Blind should be removed from the list of agencies under HHSC's purview, because it is doing an exceptional job of serving its clients and would be hindered by the interference of a more powerful HHSC.

Notes: The final version of HB 2641 contained Medicaid managed-care provisions also found in HB 2896 by Coleman and other provisions found in SB 374 by Zaffirini.

The **HRO analysis** appeared in Part One of the April 19 *Daily Floor Report*.

Changes to state welfare laws

HB 3639 by Naishtat, et al.

Died in House Calendars Committee

HB 3639, as reported by the House Human Services Committee, would have changed state law regarding public assistance, including measures that would have:

- directed the Texas Department of Human Services (DHS) to adopt sanctions for the family of a Temporary Aid for Need Families (TANF) recipient who failed to comply with the recipient's Personal Responsibility Agreement with the department;
- required case reviews of clients who were subject to termination of TANF benefits for not complying with their responsibility agreements;
- made ineligible for TANF and food stamp benefits people convicted of felonies after September 1, 1999, for violating federal drug laws;
- imposed sanctions on TANF recipients who made false statements or withheld facts for the purpose of increasing benefits or preventing a reduction in benefits;
- directed DHS to disregard the first six months of income earned by TANF recipients when determining their financial assistance benefits;
- directed DHS, the Texas Workforce Commission (TWC), or local workforce development boards to assess the needs of TANF recipients who obtain employment for continuing education, training, and other services to help them retain and advance in their jobs;
- conformed Texas laws with federal provisions that exempt TANF recipients from work requirements only if they are caretakers of children less than one year old;
- directed TWC to implement a performance-based bonus program to reward efforts by local workforce development boards to prepare, place, and maintain TANF recipients in jobs;
- required referral of recipients, if necessary, to appropriate preventive and support services, such as substance abuse treatment, family violence services, and parenting skills training, when they enter the Job Opportunities and Basic Skills program;
- directed DHS not to consider the amount of child support distributed by the Attorney General's Office to a TANF recipient when determining financial assistance benefits;
- required the Attorney General's Office to refer to appropriate state and local entities underemployed parents, in addition to unemployed parents, who are in arrears in court-ordered child support, and required TWC to provide employment assistance services to all people referred by the attorney general's office;
- authorized the use of electronic benefits cards for cash withdrawals at a retailer's point-of-sale terminal if consistent with the retailer's policies for other customers; and
- required DHS to determine a family's Medicaid eligibility in the same manner that the agency determines TANF eligibility.

Supporters said HB 3639 would strike a carefully crafted balance that met federal

requirements, increased sanctions on recipients for noncompliance with program rules, and improved enforcement in welfare-related programs, while improving assistance to welfare recipients, especially those facing personal and environmental obstacles that make compliance difficult. Given Texas' healthy economy and the effect of previous reforms in getting people off the welfare rolls, the remaining recipients are those who are harder to employ due to their lack of training and education or to personal or family problems.

Opponents said the bill would increase state welfare-related expenditures and support services. Welfare programs should be kept to a minimum to motivate people to become self-sufficient. The bill should impose stricter sanctions and requirements.

Other opponents said there were no compelling policy reasons for increasing penalties and imposing full-family sanctions. Current sanctions and penalties for noncompliance with terms of the Personal Responsibility Agreement are adequate and reflect a bipartisan agreement. Also, there is no proof that full-family sanctions improve compliance, and such sanctions, if not tested before statewide application, could result in unduly punishing innocent children in TANF families.

Notes: SB 666 by Zaffirini, which takes effect September 1, 1999, phases in the work requirement exemption for TANF recipients to conform with federal law. SB 13 by Zaffirini, et al., which also would have enacted an earned-income disregard, died in the House Calendars Committee, but the disregard was enacted by rider in the fiscal 2000-01 general appropriations act, HB 1 by Junell. Rider 31 in the DHS budget requires the agency to exclude \$120 plus 90 percent of the remaining earnings for each of the first four months a recipient is employed. The general appropriations act also increases cash assistance for eligible recipients through DHS rider 33.

Reorganizing state long-term care services

SB 374 by Zaffirini

Effective September 1, 1999

SB 374 continues the Texas Department on Aging (TDoA) until September 1, 2004, and changes the composition of its board. It also transfers to the Department of Human Services (DHS):

- on September 1, 1999, the licensing and regulation of home health agencies and medication aides from the Texas Department of Health (TDH);
- on September 1, 1999, the Deaf/Blind/Multiply Disabled program, the Personal Attendant Services program, and the voucher-payment pilot project from the Texas Rehabilitation Commission; and
- on September 1, 2001, the Medically Dependent Children's Program from TDH.

On September 1, 2003, TDoA will be abolished, DHS will assume TDoA's duties and be renamed the Department of Aging and Disability Services, and TDoA's governing board may become members of a new Aging Policy Council attached to DHS. Also, the Health and Human Services Commission (HHSC) must ensure the maintenance of no fewer than 28 Area Agencies on Aging (AAAs).

SB 374 also creates an 18-member work group to help DHS and the Texas Department of Mental Health and Mental Retardation (MHMR) coordinate long-term care planning and service delivery and a work group on children's long-term care and health programs to assist DHS, HHSC, and TDH concerning policy and funding strategies. It also renames the Chronically Ill and Disabled Children's (CIDC) program the Children with Special Health Care Needs program and makes other changes to the CIDC program.

SB 374 also requires numerous studies, creates a community assistance program for long-term care services, and requires the Planning Council for Developmental Disabilities and the Office for the Prevention of Developmental Disabilities to prepare a joint biennial report. The law also changes the issuance and renewal of nursing home administrator licenses and provisional licenses and moves the hearing of contested cases from DHS to the State Office of Administrative Hearings.

Supporters said SB 374 would move the state closer to a more comprehensive, less duplicative, and easier-to-access system for providing long-term care services. It would be a first step, not the final step, in better organizing long-term care services. Such an undertaking needs to occur in stages over several years to address effectively the wide-ranging concerns of multiple providers, regulators, and interest groups. Consolidating long-term care programs into a single state agency is necessary to create an

identifiable agency that is responsible for and can coordinate more effectively the complex range of services required by aging and disabled individuals. Fragmentation of services, a long-standing problem in Texas, is confusing to clients, administratively expensive, and a drain on available resources. Clients' medical and support needs often change as they age, and the consolidation of programs would provide a continuum of services to help disabled individuals from birth through death obtain needed services without having to reapply to program after program.

When TDoA's functions are transferred to DHS, TDoA's outstanding characteristics and programs would be maintained through continued use of the AAAs and by establishing a special Aging Policy Council.

MHMR would be involved in coordination and consolidation efforts through the establishment of a special work group that would study the coordination of services between MHMR and DHS. However, MHMR would continue as a free-standing agency because it has the necessary professional specialists and expertise to respond to the needs of people with mental retardation and mental illness, which could be lost in an agency that served other people with disabilities.

Opponents said moving programs around is unnecessary and disruptive and would not necessarily result in greater coordination. With the new powers proposed in this session's HHSC sunset bill, HB 2641 by Gray, HHSC could coordinate long-term care services and make rate setting and provider contracting more consistent without the expense and disruption of forming a new agency.

TDoA in particular should not be folded into another agency. This small agency enjoys the widespread support of elderly Texans and has done an outstanding job with limited staff and resources. Its focus and services would have to compete against other priorities in a new agency, which most likely would mean that the needs of the elderly — especially the healthy elderly — would receive less attention.

Other opponents said MHMR also should be consolidated into the new Department of Aging and Disability Services. MHMR is one of five major agencies involved in delivering long-term care services to elderly and disabled Texans, and its client population also experiences the problems of fragmentation of services.

The **HRO analysis** appeared in Part One of the May 19 *Daily Floor Report*.

Children's Health Insurance Program (CHIP)

SB 445 by Moncrief, et al.

Effective August 30, 1999

SB 445 creates the Children's Health Insurance Program (CHIP). The Health and Human Services Commission (HHSC) will develop and oversee CHIP, which must meet federal requirements (42 U.S.C., sec. 1397aa et seq.). Children under age 19 whose family income is at or below 200 percent of poverty are eligible to participate.

SB 445 also amends statutes relating to the Texas Healthy Kids Corporation (THKC) to allow HHSC to purchase CHIP-plan coverage through THKC and to subcontract for other services. The law also requires HHSC to appoint regional advisory committees for CHIP program implementation and operation.

SB 445 obligates toward the CHIP plan the first amount of money available to Texas each fiscal year from the settlement of the state's lawsuit against the tobacco industry. SB 445 specifies that the CHIP program is not an entitlement program and will end when federal funding ends unless another similar federal program becomes available, or when funds from the state's tobacco settlement become unavailable unless other state funds are appropriated.

SB 445 also requires HHSC to provide a health-benefit plan for qualified alien (legal immigrant) children and to provide Medicaid and CHIP coverage to these children if the federal government authorizes that coverage.

HHSC must submit a CHIP plan for federal approval by September 1, 1999, and must implement plan coverage by September 1, 2000, unless delayed by additional federal authorization.

Supporters said SB 445 would take advantage of the recent availability of hundreds of millions of federal dollars to help thousands of children receive needed health services. Texas has at least 471,000 uninsured children who might qualify because they are in families with incomes above the current Medicaid limit but below 200 percent of poverty.

By implementing CHIP for families up to 200 percent of poverty and also a comparable benefit plan for legal immigrant children, SB 445 would help complete a continuum of coverage options for families of all incomes and health risks, which would include Medicaid, THKC, the high-risk pool, and employer-sponsored health benefit coverage.

SB 445 would save money for local taxpayers and for individuals with health coverage, who subsidize the cost of treating uninsured children. Texas has a disproportionate

number of uninsured children. One out of every four Texas children — or about 1.4 million — is uninsured. A healthy childhood is the foundation for a healthy, productive adulthood.

SB 445 would *not* create an entitlement program that would drain state dollars continually, because the bill would direct the termination of the program should federal funding or tobacco settlement funds cease. SB 445 would promote parental responsibility through its cost-sharing structure, which would educate and move families toward the purchase of nonsubsidized health benefits when family income rose.

The health-benefit plan for legal immigrant children would help about 7,000 uninsured children who have immigrated to Texas legally since August 22, 1996, and who are barred for five years by federal law from receiving Medicaid or CHIP benefits. This provision also would conform Texas' CHIP plan to pending federal proposals, allowing Texas to draw without delay the full federal match for CHIP and Medicaid, should federal proposals become law.

Opponents said Texas should not yield to the enticement of federal dollars and set up another public program. The number of uninsured children is exaggerated because there is no indication whether any of the 1.4 million children said to be uninsured have been uninsured for one week or 10 years. Texas should not expand government bureaucracy to pay for something that families and the private market could handle on their own.

An entitlement program must pay for services for all who are eligible. Even though CHIP program enrollment would be limited to appropriated funding, constituents would come to expect and demand that such benefits and services always be available.

The state should take a more conservative step in implementing such a comprehensive new program. Proposed funding levels for fiscal 2000-01, about \$179.6 million, may not cover expected enrollments in CHIP and “spillover” in the Medicaid program. As many as 600,000 children may be eligible for Medicaid but not now enrolled, and these children may sign up for Medicaid due to the success of state outreach efforts. Eligibility should be revised to a lower level, such as 150 percent of poverty, to ensure that the state can meet program enrollment within current budget levels.

The **HRO analysis** appeared in Part One of the April 29 *Daily Floor Report*.

Availability of donated organs for transplant centers

SB 862 by Gallegos, et al.

Effective June 18, 1999

SB 862 requires a Texas organ procurement organization to distribute vascular organs to individuals on a waiting list at a transplant center in Texas. The organ may be transferred out of state if no suitable recipient can be found in Texas within a reasonable time or if the transfer is made according to a reciprocal agreement with an out-of-state organ procurement organization.

A Texas organ procurement organization is the specified recipient for organs donated if no other recipient is specified. An organ procurement organization must be federally certified before it can accept organ donations.

By July 1, 1999, the Texas Department of Health must appoint a task force with representatives from the three qualified organ procurement regions to study and make recommendations for an optimum organ-allocation policy to the governor and the Legislature by December 1, 2000. By October 1, 2000, the task force must develop and implement an optimum organ-allocation policy based on criteria such as federal guidelines, the efficiency and productivity of each organ procurement region, waiting times at Texas transplant centers, the role of local transplant centers and referral patterns in providing access to care in Texas, community efforts to encourage organ procurement, and other factors. The task force will be abolished on December 31, 2000.

Supporters said federal regulations drafted by the U.S. Department of Human Services and scheduled to take effect in October 1999 would require that organs donated across the nation be provided to the sickest patients first. Although the federal regulations are under review, SB 862 is needed because it would give official priority to Texas transplant centers for the use of organs donated in this state. Otherwise, many organs donated by Texans could be sent out of state on the basis of medical need, while eligible Texas recipients would be left on waiting lists.

Texas should protect itself because there is a great risk that a federal plan would be both cumbersome and unfair to this state. Because Texas has a large population and successful programs in place to encourage organ donation, there already is a disparity between the number of organs sent out of state versus the number received from other states. Under the current system, 222 organs are sent out of Texas every year and only 77 organs are sent into the state. Unless the Legislature takes action, the new federal plan could make this disparity worse, leave more ill Texans waiting for transplants, and complicate the success rate of organ transplants.

SB 862 would continue to allow organs to be transported out of state, but only if no recipient could be found first in Texas or on a list that was part of a Texas reciprocal agreement with another state.

The three organ procurement regions should not be replaced with a statewide network until their effectiveness can be examined carefully. The task force on optimum organ-allocation policy could consider all the available alternatives and implement a consistent and well-reasoned policy.

Opponents said organ allocation should be based on medical necessity rather than on geography. Texas should not build barriers that prevent organs from going to the neediest recipients, regardless of where in the United States those recipients may live.

Other opponents said the current system involving three Texas organ procurement regions is not working. The regions were drawn haphazardly. For example, Dallas is in the same region as El Paso, while Fort Worth is in the same region as Houston. If a recipient in urgent need of a transplant is close to a location where an organ has been donated but the location is in a separate region, that patient must remain on a waiting list. The needed organ will be transported many miles away to a recipient who may be in less urgent need. A statewide organ procurement network would improve this situation greatly, but a task force composed of representatives from the three regions would serve to reinforce the current, inefficient three-region system.

The **HRO analysis** appeared in Part Two of the May 19 *Daily Floor Report*.

Joint negotiation by physicians with health-benefit plans

SB 1468 by Harris

Effective September 1, 1999

SB 1468 allows groups of physicians comprising no more than 10 percent of the physicians within a health-benefit plan's service area to negotiate contract terms and conditions with the health-benefit plan, except for actual fee or discount amounts. The law allows the attorney general to authorize joint negotiation of actual fee and discount amounts in limited circumstances where the benefits of joint negotiation would outweigh the disadvantages from reduced competition. Physicians are prohibited from jointly coordinating work slowdowns or strikes. Physicians may not negotiate jointly to avoid participation in all of a health-care plan's products or to restrict access to the plan by non-physician health-care providers unless authorized by law.

Supporters said the growth of managed care has given health-benefit plans a tremendous advantage over individual physicians in contract negotiations. These contracts typically contain terms and conditions that are very onerous for the individual physician, such as reducing payments if the health-plan enrollees make too many visits to the doctor or transferring all liability for the cost of patient care to the physician. These onerous provisions hurt patient care. Individual physicians face the choice of turning down health plans that dominate the market or joining medical practice groups (IPAs) when they would rather work on their own. SB 1468 would prevent health-benefit plans from bullying individual physicians into accepting contracts that are good for the health-benefit plan at the expense of the patient and the physician.

Every aspect of the joint negotiation would have to be approved by the attorney general. Only 10 percent of the physicians in a health-benefit plan's service area could negotiate together. The attorney general would consider distribution of specialists and the effect on competition when making these determinations. Physicians could jointly negotiate fee or discount terms only if the attorney general determined that patients would benefit. These protections would ensure that SB 1468 would not be abused and would not decrease the quality of patient care.

SB 1468 is not a union bill. In fact, it would keep individual physicians from exercising their existing right to form unions if joint negotiation would give physicians more clout in dealing with health-benefit plans. The bill would not authorize the use of strikes or work slowdowns as negotiating tools. Physicians swear an oath to do no harm, and any collective bargaining tactic that harmed patients would violate that oath. The negotiation would not restrict health plans, since they could go to other physicians or groups of physicians and even could meet individually with physicians in the negotiating group.

IPAs are not substitutes for the joint negotiation that SB 1468 would provide. Forming an IPA is complex and expensive, and even then the IPA cannot negotiate freely without setting up strict procedures against sharing proprietary information. Even if an IPA or group of physicians goes to the expense of requesting an advisory opinion from the Federal Trade Commission (FTC), such opinions do not prevent a health-benefit plan from bringing future antitrust actions against the physicians. The threat of an antitrust action is enough to force a physician or IPA into submission, because the expense and time involved in defending against even an unsubstantiated antitrust claim can be enormous. IPAs cannot be seen as a solution to the problem unless the Legislature is willing to give up the tradition of doctors maintaining their own individual offices.

Health-benefit plans often argue that legislation intended to protect patients and physicians would raise the cost of premiums. The major factors that contribute to higher medical costs are an aging population, new medications, and advances in medical technology. There is no proof that limited joint negotiation by physicians would increase costs. Any savings that now come to health-benefit plans from abusive conditions in their contracts are kept by the plans and not passed on to patients.

Opponents said the FTC has stated that SB 1468 would have anticompetitive effects that would harm consumers. An increase of only 1 to 5 percent in the cost of medical care due to physician joint negotiation would add from \$10 million to \$40 million to the cost of state and local government health plans. Regardless of its well-meaning protections, the end result of SB 1468 would be higher medical costs.

According to FTC advisory opinions, physicians already can share information on patient care and managed care development for the purpose of providing better care. Therefore, the ultimate goal of increased joint negotiation power would have to be to increase the physicians' fees and profits at the expense of patients and health plans. Once the door was opened to physician joint negotiation, it would be hard to enforce protections against obstructionist tactics and to prevent the general dissemination of a plan's proprietary information.

Texas would be the first state to allow joint negotiation — really collective bargaining — outside of the employment relationship for independent contractors. Only Washington state has attempted this type of measure, and that state excluded fee and discount terms from physician joint negotiation.

The **HRO analysis** appeared in Part One of the *May 25 Daily Floor Report*.

Higher Education

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TEXAS and Teach for Texas student grant programs

HB 713 by Cuellar, et al.

Effective June 19, 1999

HB 713 establishes the Toward EXcellence, Access, and Success (TEXAS) grant program and the Teach for Texas grant program to provide monetary support to eligible students to attend public and private institutions of higher education in Texas. It also establishes the Teach for Texas pilot program allowing the State Board of Education to offer financial incentives for people seeking alternative teacher certification. The law waives tuition and fees for Texas residents who are full-time students first classified as prisoners of war on or after January 1, 1999, and it amends existing law to allow full-time faculty members at institutions along the Texas-Mexico border who receive doctoral degrees after September 1, 1999, to qualify for student loan repayment assistance programs. It repeals existing student grant and scholarship programs.

The Texas Higher Education Coordinating Board will administer the TEXAS grants, providing them to Texas residents with the greatest financial need who complete college preparatory classes in high school or earn associate degrees. Student recipients of TEXAS grants must enroll in at least three-fourths of the full course load in college and must make satisfactory academic progress toward a degree. A public institution of higher education may not charge a person receiving a TEXAS grant more in tuition and fees than the amount of the grant.

College juniors and seniors may receive Teach for Texas grants if they agree to teach full-time for five years in a field or public school experiencing a critical shortage of teachers. Following a two-year phase-in period, only those who receive the TEXAS grant will be eligible to receive the Teach for Texas grant, which equals twice the amount of a TEXAS grant. HB 713 also requires the coordinating board, in cooperation with other educational agencies and institutions, to establish a financial aid information center.

Supporters said the two greatest obstacles faced by students seeking access to higher education are cost and lack of preparedness. The Teach for Texas and TEXAS grant programs would go far toward encouraging preparedness and would open college doors to those who could not afford it otherwise. HB 713 would consolidate or repeal existing financial aid programs to provide a more efficient and understandable financial aid system. The program would be based both on financial need and on completion of college preparatory courses. Studies show that taking college preparatory courses is one of the best predictors of a high school student's future success in college. The bill also would provide incentives for people to teach in Texas' public schools, thus helping to alleviate the shortage of teachers.

The estimated cost of \$100 million for fiscal 2000-01 would not be too expensive. The House Higher Education Subcommittee on Agency Oversight and Financial Aid Programs recommended spending \$200 million in additional funds for higher education grants. The Texas Commission on a Representative Student Body recommended an additional \$500 million. This legislation would promote economic development in Texas by making a more highly-skilled workforce available for new industries, as well as by increasing the state's overall education level.

Opponents said the new grant programs would be too expensive. This financial aid would be based on need, but scholarships ought to be based on merit, traditionally measured by grade averages and test scores. Having a lower family income or no family financial support is no predictor of future success and should not be the criterion for receiving a scholarship. Even if a needs-based program were warranted, the eligibility requirements in this bill are too restrictive and the bill would help too few needy students. Only about 40 percent of high school graduates take the college preparatory courses needed to qualify for these grant programs.

The **HRO analysis** appeared in Part One of the April 20 *Daily Floor Report*.

Permanent higher education health funds

HB 1945 by Junell, Cuellar
Effective August 30, 1999

HB 1945 establishes, using tobacco lawsuit settlement funds, permanent health-related endowments for higher education. The University of Texas System board of regents will administer a \$350-million permanent fund for programs that benefit medical research, health education, or treatment programs at six health-related schools within the UT System and Texas A&M University Health Science Center (TAMUHSC), University of North Texas Health Sciences Center (UNTHSC), Texas Tech University Health Science Center (TTUHSC), and Baylor College of Medicine. Seventy percent of the fund's earnings must be distributed in equal amounts to each institution, with the remaining 30 percent distributed in equal amounts based on three funding criteria: instructional expenditures, research expenditures, and unsponsored charity care.

Thirteen separate permanent endowment funds for public health research and programs, totaling \$595 million, are to benefit eight UT System institutions (\$470 million), as well as TAMUHSC, UNTHSC, TTUHSC, TTUHSC in El Paso, and Baylor College of Medicine (\$25 million each).

HB 1945 creates a \$45-million permanent endowment fund for grants to schools that offer upper-level nursing or allied health education classes and are not funded by a specific permanent health fund created by HB 1945. It sets up a \$25-million permanent endowment fund for grants to schools that conduct or form partnerships to conduct minority health research and education programs. It also appropriates \$1 million to the Texas Higher Education Coordinating Board to contract with the Baylor University Medical Center in Dallas to study the relationship of maternal smoking and metabolic impairments in low-weight infants and to support an antitobacco task force.

Supporters said HB 1945 would create higher education endowments similar to those outlined in the memorandum of understanding negotiated by legislative leaders on disposition of funds from the tobacco lawsuit settlement. The endowments would ensure perpetual funding for health research, education, and treatment programs, and would permanently support the excellent network formed by Texas' health care-related higher education institutions and their efforts to collaborate and coordinate similar research, services, and other programs.

The endowments also would serve to attract more grants and donations for scientific research, medical education, and treatment for the underserved, uninsured, and indigent. The transition to managed care is forcing health care institutions nationwide to find alternate funding sources to continue life-saving research and to provide care for the

indigent.

It makes good sense to use tobacco lawsuit settlement funds for this purpose because the settlement was aimed at recovery of costs to taxpayers for tobacco-related illnesses of Medicaid patients, many of whom are served by these teaching hospitals. Because HB 1945 would base a proportion of the distributions from the \$350-million permanent fund on an institution's provision of unsponsored charity care, it would encourage institutions to record their indigent health care and to reach out to underprivileged communities, which often were targeted by the tobacco marketers.

HB 1945 would reflect only one part of the first round of appropriations from the settlement, which calls for a 25-year payment plan. During the next biennium, the Legislature could fund junior and technical colleges not funded in HB 1945.

Opponents said the endowments established for individual institutions would fund duplicate research centers. For example, the proposed children's research center in San Antonio could duplicate the efforts of the Texas Children's Cancer Center in Houston, less than 200 miles away. Also, about 30 percent of the permanent fund distributions would be allocated based on previous biennial spending. This would create a disadvantage for institutions traditionally funded at lower levels and for any future institutions covered by the fund.

Other opponents said the endowment funding grants to nursing and allied health programs would exclude junior colleges and technical institutes. These institutions provide valuable and affordable education for students in these fields and should be included.

The **HRO analysis** appeared in Part One of the April 20 *Daily Floor Report*.

Permanent University Fund distribution and investment

HJR 58 by Junell, Cuellar

Effective pending voter approval on November 2, 1999

HJR 58 would amend the Texas Constitution to allow the University of Texas (UT) System board of regents to determine distributions from the Permanent University Fund (PUF) to the Available University Fund (AUF) based on the total return on all PUF investments rather than only dividends, interest, and other income. HJR 58 would require annual distributions from the PUF to the AUF:

- to cover no less than the amount needed to pay monies due on bonds and notes pledged against the PUF's earnings;
- to ensure the purchasing power of the PUF in any 10-year period;
- to ensure the purchasing power of a predictable and stable stream of annual payments to the AUF; and
- not to exceed 7 percent of the average net fair market value of PUF investment assets, except as necessary to pay monies due on bonds and notes.

A temporary provision, expiring on January 1, 2030, would require that distributions from the PUF to the AUF at least cover bonds and notes issued before January 1, 2000.

HJR 58 also would allow the UT System board in managing PUF assets to consider investment of the fund's total assets rather than a single investment.

Supporters said the purpose of HJR 58 is to modernize the investment and spending principles of the PUF and the AUF. Current provisions of the Texas Constitution inhibit the ability of the PUF to preserve its purchasing power. The Constitution mandates the distribution only of interest and dividend income to the AUF and prohibits the distribution of realized and unrealized gains. These provisions are incompatible with generally recognized endowment policies that restrict distributions to the average total investment return after inflation. The Legislative Budget Board's fiscal note conservatively estimates that HJR 58 would allow distributions to the AUF to increase by \$33.6 million in fiscal 2000, up to \$49.75 million by fiscal 2004.

Opponents said that any capital gains from PUF investments should be reinvested in the fund rather than distributed to the AUF, regardless of the limitations and conditions in HJR 58. A conservative investor should err on the side of preserving the corpus of the endowment. The only way to assure that practice absolutely is to reinvest capital gains.

The **HRO analysis** appeared in Part One of the May 3 *Daily Floor Report*.

Judiciary

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Creating 22 new state district courts

HB 400 by Thompson, et al.
Generally effective August 30, 1999

HB 400 creates 22 new state district courts in Texas' largest counties, converts several existing multicounty judicial districts into single-county districts, and grants concurrent jurisdiction to other several other counties.

HB 400 establishes these district courts effective September 1, 1999:

- 379th, serving Bexar County;
- 386th, serving Bexar County, with preference to juvenile matters;
- 387th, serving Fort Bend County, with preference to family law matters;
- 388th, serving El Paso County, with preference to family law matters;
- 389th, serving Hidalgo County, with preference to criminal matters;
- 398th, serving Hidalgo County, with preference to family violence and criminal matters; and
- 402nd, serving Wood County, which will have concurrent jurisdiction with the county court in Wood County.

The law establishes these district courts effective October 1, 1999:

- 390th, serving Travis County, with preference to criminal matters; and
- 391st, serving Tom Green County, which may accept case referrals from other state district courts in the county.

The 391st district court may enter into a system with the 51st, 119th, and 340th district courts in which one judge may substitute for another.

HB 400 establishes these district courts effective January 1, 2000:

- 393rd, serving Denton County, with preference to family law matters;
- 395th, serving Williamson County;
- 396th, serving Tarrant County, with preference to criminal matters; and
- 408th, serving Bexar County, with preference to civil matters.

These district courts are established effective September 1, 2000:

- 399th, serving Bexar County, with preference to criminal matters;
- 400th, serving Fort Bend County;
- 401st, serving Collin County;

- 407th, serving Bexar County; and
- 409th, serving El Paso County.

HB 400 establishes the 403rd district court, serving Travis County, with preference to criminal matters, effective December 1, 2000. It establishes these district courts effective January 1, 2001:

- 404th, serving Cameron County;
- 405th, serving Galveston County; and
- 406th, serving Webb County, with preference to family violence and cases under the Family Code and the Health and Safety Code.

The initial vacancies for the 404th, 405th, and 406th district courts will be filled by election in 2000, with the governor filling any subsequent vacancies. The governor may appoint judges to fill the initial vacancies in the other new courts.

Supporters said HB 400 would help relieve docket overcrowding and would distribute more evenly the population served by the district courts in these areas. Criminal and civil dockets have been increasing across Texas. Increases in family law-related and juvenile cases require specialized judicial attention. With the new courts, more judicial resources would be available for other criminal and civil cases in these counties. More courts for these counties would improve the administration of justice.

At-large elections for district court judges were found not to violate section 2 of the federal Voting Rights Act in *LULAC v. Clements*, 986 F.2d 728 (5th Cir.1993) (en banc), cert. denied 510 U.S. 1071, 114 S. Ct. 878 (1994). The Texas Constitution does not require the governor to make the initial appointment for all new courts.

Opponents said that until Texas reforms its system of electing judges, no new district court should be created. A new district court costs the state more than \$100,000 per year to operate, and these new courts would cost a total of \$2.5 million per year, according to the fiscal note. Three of the 22 new courts would be filled initially by election rather than by the governor. The governor vetoed a 1997 bill that would have created 15 new district courts because four of the courts would have been filled initially by election rather than by gubernatorial appointment.

The **HRO analysis** appeared in Part One of the April 28 *Daily Floor Report*.

Revising judicial selection of appellate judges

SJR 9 by Duncan, et al.

Died in House Calendars Committee

SJR 9, as adopted by the Senate, would have proposed a constitutional amendment to allow gubernatorial appointment, followed by nonpartisan retention elections, of the members of the Texas Supreme Court, Court of Criminal Appeals, and 14 courts of appeals. After serving an initial term of up to six years, depending on when during the year a judge was appointed, the judge would have stood for a non-partisan retention election during the regular November elections. Judges retained by the voters would have served additional six-year terms. If voters failed to retain a judge, that seat would have become vacant and subject to being filled by gubernatorial appointment.

SJR 9, as reported by the House Judicial Affairs Committee, would have merged the Supreme Court and Court of Criminal Appeal into a single high court with 14 justices and one chief justice. The court would have been allowed to preside in panels of at least five members. The high court would have been required to sit en banc for capital murder cases, motions for rehearing granted by the court, and other cases required by law. The 14 justices would have been elected from seven districts established by the Legislature initially on a partisan ballot. Once elected, they would have faced nonpartisan retention elections every six years. The governor would have appointed the chief justice to a six-year term with a 20-year term limit, including previous service on the court. A new chief justice could not have been appointed from the same district as the previous chief justice. Elections for judges on the courts of appeals initially would have been partisan elections followed by nonpartisan retention elections every six years. Chief justices of courts of appeals also would have had a 20-year term limits.

Supporters said many judicial races are too often decided more by party affiliation than by individual merit. Shifting tides of party fortune, not judicial performance, have caused the defeat of significant numbers of qualified, capable judges in the last six years. Because judges are barred from stating positions on specific issues, factors like party affiliation or campaign advertising have gained undeserved importance in judicial elections. Past party sweeps of statewide judicial races suggest that many voters look more at party affiliation than at the particular qualifications of each candidate.

Appointment with retention elections would establish an ideal balance of competing interests: it would minimize the influence of campaign contributions, ensure a roster of qualified candidates, guarantee citizens a voice in judicial selection, and ensure the assessment of candidates on the basis of their records rather than their public relations capabilities. Many states have abandoned partisan judicial elections, precisely because of the complaints cited by opponents of Texas' current system. Most of these states have

adopted the retention election system.

Allowing for initial election with retention elections thereafter would allow for the greatest amount of citizen input in the initial selection of judges, then remove partisan politics from the system through subsequent retention elections.

Combining the two highest courts in Texas was proposed in HJR 1/SJR 1 by Junell and Ratliff, the proposed revision of the Texas Constitution, and would bring Texas in line with 48 other states that have a single court of last resort.

Opponents said retention election systems actually could work to retain incompetent judges. The onus would be on the voters to mount a campaign to oust bad judges. The effort to collect funds to combat a retention election would be made doubly hard without a clear candidate to oppose the incumbent. Furthermore, this system inevitably would suffer the same problems that plague both elective and appointive systems. Voters could be swayed to reject judges for the wrong reasons. In 1986, a high-dollar campaign unseated three California Supreme Court justices, allowing the new governor of a different party to replace his predecessor's appointees. Regardless of the process for initially selecting judges, all of these systems could neglect the need to promote diversity among the judiciary. Finally, retention elections would be subject to the same phenomenon of mass voter dissatisfaction with the status quo that has produced wholesale sweeps of incumbents, regardless of their particular qualifications.

While the idea of combining the two highest courts into a single court could have some merit, it would be a drastic change in functions of the courts. Coupled with the division of the court members into judicial districts, the plan would bring substantial uncertainty to the operations of the courts for years to come.

Public Education

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Parental notice of uncertified teachers

HB 618 by Dukes
Effective June 19, 1999

HB 618 requires a school district to provide written notice to parents of each student in a classroom in which the district assigns an inappropriately certified or uncertified teacher for more than 30 days. The law defines a inappropriately certified or uncertified teacher as a teacher serving with an emergency certificate or who holds no certificate or permit. Parents must be notified no later than 30 days after the instructor's assignment to the classroom. The district also must ensure that the notice is provided in a bilingual form to any parent whose primary language is not English. The notice requirement applies starting with the 1999-2000 school year.

Supporters said parents have the right to be informed whenever a district fails to provide an adequately certified teacher in the classroom, and the district should be held accountable. While some circumstances may require assigning a teacher on an emergency basis to cover a shortage of certified teachers, a district should take all steps necessary to ensure that an appropriately certified teacher eventually is assigned to the classroom. HB 618 would be limited to instructors who are uncertified or who hold an emergency permit only, and it would not affect school district operations significantly.

Opponents said the bill would create a needless additional mandate on local school districts. Parents need to know not whether a teacher is certified but how well their children are learning the particular subject being taught.

Other opponents said HB 618 would not go far enough in informing parents of inappropriately certified teachers. To provide greater accountability, the bill also should cover teachers who hold a permit in a different area of certification from the class being taught, those serving on other special permits, and those employed under a waiver granted by the commissioner of education.

School finance, teacher salaries, property tax relief, social promotion

SB 4 by Bivins, et al.

Effective September 1, 1999

SB 4 dedicates more than \$3.86 billion of additional money to public education, targeting funding at four main areas of the public education system: increasing teacher salaries, providing property-tax rate reductions through state equalization funding for school facilities, providing grants and funding to targeted educational programs, and increasing overall funds available to school districts.

Teacher salaries. Under SB 4, all teachers in all districts will earn \$3,000 more in the 1999-2000 school year than they would have earned otherwise. Teachers who normally get a salary “step” increase for an additional year of service will receive the \$3,000 raise on top of any amount to which they were entitled already. The law also extends the state minimum salary schedule to cover full-time school nurses and counselors in addition to the teachers and librarians already included under the schedule. SB 4 repeals the current “escalator” clause that increases the minimum salary schedule and minimum number of days of service based on increased funding in the school finance system. Instead, SB 4 sets the minimum number of service days at 187.

To ensure that all districts have enough money to pay every teacher the increase, SB 4 increases the basic allotment — the amount of money that a district is entitled to receive per student — from \$2,396 to \$2,537. For districts that will not receive enough money from that increase and from increases in the Tier 2 guaranteed yield, discussed below, the state will provide additional assistance for two years.

Equalized funding for school facilities. SB 4 creates a separate “tier” of equalized funding for facilities debt. It also expands the Instructional Facilities Allotment (IFA) by \$150 million for fiscal 2000-01 and increases the guaranteed yield for the IFA from \$28 to \$35 per student per penny of tax effort. New provisions also increase the likelihood that a district will receive IFA assistance if the district has experienced significant growth in the past five years.

The law creates a new Existing Debt Allotment (EDA) to equalize continuing debt for facilities included in the district’s debt-service collections for the 1998-99 school year for which the district receives no other assistance. The guaranteed yield of the EDA is \$35 per student per penny of tax effort up to 12 cents.

Property tax relief. SB 4 raises the equalized wealth level — the point at which a district must exercise one of five recapture options to lower its property wealth — from the current \$280,000 of property wealth per weighted student to \$295,000. It also

permanently extends the “hold harmless” provision for wealthy school districts, first granted in 1993, which ensures that those schools can maintain per-student funding at 1992-93 levels before having to exercise one of the recapture options. The hold-harmless provision is indexed to account for the new equalized wealth level, but the indexing is based on the district’s tax rate, so that the higher a district’s tax rate, the less money will be subject to recapture. Other property tax relief will result from permanently extending the hold-harmless provision for the 1997 increase in the homestead exemption.

The remainder of property tax relief results from “compressing” Tier 2 tax rates. Currently, districts are guaranteed a yield of \$21 per weighted student per penny of tax effort on tax rates between 87 cents and \$1.50. SB 4 increases the guaranteed yield to \$23.10 and allows the commissioner to recompute the tax rate the district needs to generate the same amount of revenue at the higher yield. The district’s tax rate then will be adjusted down to that level.

To ensure that districts do not raise tax rates significantly following the rate reductions outlined above, SB 4 reduces the rollback tax rate. Current law requires a district to receive voter approval to adopt a tax-rate increase greater than the rollback rate, which generally is the rate that a district would need to levy to receive the same amount of funding with the current year’s property values as it received in the previous year, plus 8 cents and any rate necessary for debt service. SB 4 lowers the rollback rate to 3 cents for the 1999 tax year and to 6 cents for every year after that.

Additional funding for districts. SB 4 increases the Tier 2 guaranteed yield — the amount of revenue a district is entitled to raise on tax rates between 87 cents and \$1.50 — from the current \$21 per weighted student per penny of tax effort to \$24.99.

SB 4 also provides a new per-student allotment to districts in the first and second years of operation of a new facility. This allotment is designed to help fast-growing districts cover the costs of opening new facilities that are not covered by the amounts included in the bonds for the new facilities.

Ending social promotion. SB 4 creates a new Student Success Initiative to end social promotion. Beginning in the 1999-2000 school year, kindergarten students will be tested through a reading diagnostic instrument. Those who fail the assessment will be placed in an accelerated reading instruction program. The program will be expanded to the first and second grades in the next two years if sufficient funds are appropriated statewide.

For students in the third, fifth, and eighth grades to be promoted to the next grade level, they will have to perform satisfactorily on certain Texas Assessment of Academic Skills (TAAS) tests for that grade level. Third graders will have to pass the reading test,

beginning in the 2002-03 school year, and fifth and eighth graders will have to pass the reading and mathematics tests, beginning in the 2004-05 and 2007-08 school years, respectively. Students who fail to perform satisfactorily on tests in those grades will get at least two more opportunities to take the test. If, after the third attempt, the student still does not pass, the student will be held back in the next school year. A parent may appeal a retention decision to a grade-placement committee, composed of the principal or a designee, the teacher of the subject of the test, and the student's parent or guardian. The committee's decision to promote a student must be unanimous. Regardless of whether a student is promoted, a student who fails to pass the required tests after three attempts will be assigned to an accelerated instruction program during the next school year to ensure that the student will perform at the appropriate grade level by the end of that year.

Competitive grant programs. SB 4 establishes a competitive grant program to implement or expand kindergarten and pre-kindergarten programs to a full-day basis or to implement new pre-kindergarten programs. The law creates a similar grant program to allow districts to add an education component to federally funded Head Start programs for preschool children. SB 4 also creates a competitive grant program to allow districts to provide a "second chance" program for students who have not earned enough credits to advance from the ninth to the tenth grade.

Supporters said SB 4 would represent the largest infusion of state dollars into public education in history. It would grant teachers across the state a much deserved \$3,000 pay raise, reduce school property taxes by \$1.35 billion, and help end social promotion.

SB 4 would increase the equity in the school finance system so that about 90 percent of students would be in the equalized system and more than 99 percent of revenue would be equalized. These figures are much better than the model under current law, which would place 83 percent of students in the equalized system and keep 95 percent of revenue equalized. Districts that would benefit most from the bill would be the poorest districts that receive Tier 2 funding.

While some may argue that one element or another should be reduced to increase funding to another element, that should be avoided. The funding elements have been designed and balanced so as to provide the greatest yield to all four elements at the same time. Some may argue that if any element should be reduced, it is the property tax element, which would provide minimal yearly savings to individual taxpayers. However, the actual tax savings would be only part of the benefits provided by tax rate compression. Reducing rates by an average of 6 cents would help to expand the space between the average maintenance-and-operations tax rate and the \$1.50 tax-rate cap. That space is essential to giving districts meaningful control to set their tax rates and to avoid a determination that the school finance system creates an unconstitutional statewide property tax.

Students are not helped by simply being promoted on to the next grade without having the academic skills necessary to perform at that level. Instead, these students should be diagnosed early to detect any reading difficulties, and they should receive intensive, accelerated instruction to increase their reading proficiency to grade level. By instituting a structured program of diagnostics and accelerated instruction for students who need help, these students would be better prepared and more likely eventually to graduate from high school with the academic skills needed to be successful in the workforce or in higher education. The individualized grade-placement committee process would ensure that the best interests of each child would be examined in determining whether it would be in the child's best interests to be promoted to the next grade level or held back.

Opponents said rather than focus on providing tax cuts that the average taxpayer barely would notice, the Legislature should direct that money to areas such as teacher salaries or other critical needs. Under this bill, a taxpayer in an average district would save \$60 per year on a tax bill for a residence with a taxable value of \$100,000, before any increases at the local level. Other property taxpayers, including businesses, would see similar rate reductions based on their property valuations. The Legislature should allocate that money to priority funding elements rather than leave it as a windfall to the districts.

The outlay of new funds in SB 4 was made possible by a substantial surplus of funds available for fiscal 2000-01. The bill, however, would require a significant portion of these funds to be continued indefinitely and included in the school finance system for years to come, when the state's financial situation may not be as good as it is now.

The significant changes to the accountability system envisioned under the proposals for ending social promotion would have detrimental effects on students who were retained from one grade to the next. Also, the cost of this program would increase significantly over the coming years as students that failed the TAAS tests were required to retake the tests and to attend additional instructional programs during and after school and in the summer to be able to pass the test.

Other opponents said because of the hold-harmless provisions and the increase in the equalized wealth level, property-wealthy districts likely would benefit most from this legislation. These formulas should be redesigned to provide more benefits to less wealthy districts or to force the wealthy districts to bring their revenues down into the equalized system.

The **HRO analysis** appeared in Part One of the May 23 *Daily Floor Report*. For additional information, see HRO Focus Report Number 76-13, *Summary of SB 4: School Finance and Property Tax Relief*, June 4, 1999.

SB 10, as reported by the Senate Education Committee, would have established a “Public Education Scholarship Program” to allow certain students in public schools to attend private schools. The vouchers would have been available to students residing in Bexar, Dallas, El Paso, Harris, Tarrant, and Travis counties. The students would have to have been economically disadvantaged, to have failed to pass a portion of the most recently administered TAAS test, and to have been enrolled in a public school. No more than five percent of a district’s population would have been allowed to use vouchers at one time. A district would have been required to provide scholarships of 80 percent of the amount of state and local funds per student in that district. The remaining 20 percent of funds would have stayed in the district.

In order for a private school to have received funds under the program, the school would have to have provided transportation for all scholarship students, to have been accredited by an organization recognized by the commissioner of education, to have provided special education and bilingual education services, and to have reported the performance of all public education scholarship students on the TAAS test and other state-required accountability criteria. A private school would have been prohibited from charging any tuition in excess of the scholarship amount. A school would have been prohibited from refusing to enroll a child. If more students had applied than the school had space for, those students at risk of dropping out of school would have to have been given priority, and other students would have to have been chosen by lottery.

The bill would have required the State Board of Education to have selected an impartial organization to evaluate the program after five years. Beginning with the 2005-2006 school year, a private school could not have accepted any public education scholarship students unless the average academic achievement of its public education scholarship students was at least 10 percent higher than comparable public school students.

Supporters said enhanced school choice provides students in low-performing public schools with the opportunity to improve their achievement by putting them in a better learning environment. In the long run, the pressure exerted on public schools by competition with private schools would force better teacher pay, leaner and more efficient administration, and eventually better public schools.

Increased competition would promote efficiency in schools and innovation in learning programs to attract students. Charter schools already use competition to promote new learning environments for students not successful in the traditional school structure.

Increasing student access to innovative private schools would expand the pool of competitive ideas from which parents and students could draw.

This bill would be targeted to needy students and would include safeguards and accountability requirements to ensure that private schools given public funding to educate students would provide the services those students needed. Limiting the scope and the length of the experiment would ensure a reasoned examination of the costs and benefits of a publicly funded voucher program that would determine whether such a program actually increased academic achievement.

Opponents said using public dollars to subsidize private schools would not improve the public schools but rather would undermine the public education system. As students left public schools to attend private ones, those who remained would face a system with fewer dollars to spend on the neediest students. No convincing evidence has been presented to show that private schools provide a better academic environment than public schools. Also, the U.S. Supreme Court has issued no definitive decision about the constitutionality of using public funds to pay for education at religious private schools.

Competition with private schools might spur some public schools to change some policies or procedures to staunch the flow of students leaving their schools. But with dramatically reduced budgets per pupil and an increasing percentage of students for whom education costs would increase, the level of innovation that these schools could undertake would be limited significantly.

This bill would not provide additional choices for students in rural areas without private schools. Forcing all taxpayers to pay for a program that would benefit only those in certain areas of the state would be an unfair burden. The greatest beneficiaries of a voucher program ultimately would be those already paying to attend private schools. No matter how limited a voucher program might be initially, pressure eventually would build from those who already were paying to send their children to private schools to have that cost subsidized by the government.

Other opponents said vouchers would hurt private schools by increasing government control and eventually could lower the standards and eliminate the uniqueness of private schools. Once private schools accepted publicly funded vouchers, they would have to accept an increasing level of government regulation over their operations.

For more information, see HRO Focus Report Number 76-2, *The School Voucher Debate*, December 22, 1998.

SB 103 revises the requirements for the Texas Assessment of Academic Skills (TAAS) tests given to students and the exit-level exam for high school graduation. Students in the third through sixth grades will continue to be tested on reading and mathematics in every grade, as well as on writing in the fourth grade. Fifth graders now will be tested in science. The eighth grade writing test will be moved to the seventh grade. New reading and mathematics tests will be given in the ninth grade. New English language arts, mathematics, science, and social studies exams will be given in the tenth grade. The exit-level exam will be moved from the tenth to the eleventh grade and will include science and social studies in addition to English and mathematics. SB 103 requires the Texas Education Agency to administer all tests no later than the 2002-03 school year, except for the new ninth and tenth grade tests, which will be administered beginning in the 2004-05 school year.

All students with limited English proficiency whose primary language is Spanish must take either a Spanish-language TAAS test or the English test for the third through sixth grades. The student's language proficiency assessment committee will decide which test the student should take. Students must take such tests beginning in the 1999-2000 school year, and their performance on such tests will be included in the accountability system.

SB 103 includes in the accountability system the numerical progress of students who failed to perform satisfactorily on a previous TAAS test. The numerical progress on subsequent assessments must be aggregated by grade level and subject area.

Supporters said SB 103 would keep Texas' nationally recognized accountability system strong by expanding the TAAS test in certain grades and adding tests in grades that are not tested now, providing a more accurate picture of academic achievement. What is tested on the TAAS test is certain to be taught in the classroom. That alignment of curriculum and assessment ensures that students receive a structured flow of courses from one grade to the next and that each assessment appropriately identifies whether students have mastered the foundation curriculum material taught at that level.

Adding tests in the higher grades would fill out the current battery of tests and would help ensure that students in high school, where dropout rates are highest, were assessed adequately to determine their weaknesses and to enable teachers to help students overcome those deficiencies. Moving the exit-level test to the eleventh grade would ensure that students would be tested on three-fourths of what they were expected to learn in high school in order to graduate. The current test is based on no more than half of the

material that is supposed to be taught during high school. Adding a tenth-grade exam before this exit level would help to target weak areas in the student's skill levels and would allow additional instruction in those areas before the exit test.

The bill would enhance assessment and accountability for non-English-speaking students in public schools. There is no need to exempt Spanish-speaking students from taking the Spanish-language TAAS now that one is available, and there is no reason that the scores of those students should not be reported in the accountability system. Failing to assess such students does them a disservice by failing to provide them and their teachers with information on the students' progress.

Opponents said Texas already places too much emphasis on the TAAS test, and this legislation would increase the hold TAAS has on the public school system. Students are drilled constantly on the test, and many such drills emphasize test-taking skills over actual academic learning. While student performance on other tests has risen, such performance gains can be attributed at least partially to better test-taking skills taught in order to perform well on the TAAS.

The increased importance of the TAAS test in the school accountability system would create additional pressure on campuses and districts to find any way to make sure that students perform up to par. This pressure already has led to at least one district tampering with TAAS records to improve the ratings at certain schools.

Requiring the exit-level TAAS to be completed before a student could graduate would discriminate against minority students, who tend to perform more poorly on the test than Anglo students. Such students are placed at greater risk of not graduating regardless of their other accomplishments only because of their inability to pass a single test.

While it would be appropriate at some specific times to test Spanish-speaking students using the Spanish-language TAAS, many such students are not fluent enough in written Spanish for the test to be useful. Forcing students to take a Spanish TAAS test could force some to devote their efforts to improving their written Spanish at a time when their efforts would be better served studying English.

Notes. HB 3675 by Garcia, requiring testing of Spanish-speaking students, was substantially incorporated into SB 103 in conference committee.

The **HRO analysis** of SB 103 appeared in Part Two of the May 20 *Daily Floor Report*. The analysis of HB 3675 appeared in Part One of the May 10 *Daily Floor Report*.

Changes to the Teacher Retirement System

SB 1128 by Armbrister, et al.
Effective September 1, 1999

SB 1128 makes substantial changes to Teacher Retirement System (TRS) benefits and the designation of retirement beneficiaries. The law increases the standard service retirement annuity multiplier from the current 2.0 percent to 2.2 percent for active and retired system members. SB 1128 also authorizes TRS to make partial lump-sum payments of retirement benefits under certain conditions and requires TRS to contract for specific optional insurance services, including permanent life insurance, long-term care insurance, and short- and long-term disability insurance. The law clarifies the investment authority of the TRS board of trustees by defining the securities in which the board may invest. It also requires the Legislative Audit Committee to choose an independent firm during fiscal 2000-01 to evaluate TRS investment practices and performance.

Supporters said SB 1128 would increase retirement benefits to Texas teachers and related personnel. Some estimates place the current benefits package for Texas teachers at a national ranking of 51st, including the District of Columbia. This bill would give teachers and other school personnel a much-deserved increase in the retirement service credit multiplier, enabling a teacher with 30 years of service to retire with 66 percent of the teacher's annual salary rather than with the current 60 percent. For current retirees, the bill would provide an adjustment in retirement take-home pay based on changes in the Consumer Price Index. The lump-sum payment provisions would provide ready cash for retirees who need extra help making the transition to retirement. SB 1128 also would give retirees flexibility to change named beneficiaries within an extended period of time. The bill would have no fiscal impact on the state.

Opponents said SB 1128 would increase the system's unfunded actuarial accrued liability by \$5.6 billion. Although the amortization period for this unfunded liability would be less than required by law, the unfunded liability would result in system payments over a span of 22 years to finance the increased benefits.

The **HRO analysis** of the House companion bill, HB 2701 by Greenberg, appeared in Part One of the May 10 *Daily Floor Report*.

Taxation and Revenue

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Repealing total lottery prize limit

HB 844 by Wilson
Effective June 19, 1999

HB 844 repeals the limit on the total prize payout from the state lottery, which was set at 52.45 percent of total ticket sales revenue. For fiscal 2000, if the payout set by the Lottery Commission exceeds 57 percent of total ticket sales revenue, the commission's advertising budget will be limited to \$40 million, less \$1 million for each percentage point by which the payout exceeds 57 percent. For subsequent fiscal years, the advertising budget penalties will apply when the payout exceeds 52 percent.

Supporters said that the increased lottery sales revenue that would result from raising lottery prize payouts and eliminating the arbitrary limit on prize payouts would provide much-needed funds for public school financing and pay increases for teachers. The bill would raise about \$40 million in additional revenue from the lottery each fiscal year after fiscal 2000.

Since the prize limit was enacted in 1997, sales for all lottery games have fallen, with instant ticket sales declining the most. From fiscal 1997 to fiscal 1998, overall sales fell 18 percent, while instant ticket sales fell 24 percent. The Lottery Commission projects that sales in fiscal 1999 will decline by another 8 percent. Before the enactment of the prize limit, lottery sales had increased at least 10 percent each year for the three previous years. The decline in sales is directly related to public knowledge that the Lottery Commission is awarding a smaller share of total revenue as prizes.

While the intent of the prize limit was to claim more lottery revenue for the state, the result was a loss of revenue due to decreased ticket sales. The only effective way to increase lottery revenue to the state is by increasing overall lottery sales. States like Georgia and Indiana experienced similar sales drops after their lottery payout percentages were decreased. Lottery sales rebounded in those states once payout percentages were returned to their previous levels.

There was no limit on the total amount of prizes from the inception of the Texas lottery in 1992 until 1997. A statutory limit on prize awards is not required for the operation of a successful and efficient lottery. If Texas is going to have a lottery, it should be run in a way that maximizes revenue to the state. However, the limit on advertising would provide a needed restraint to offset the greater enticement to gamble of a higher payout.

Opponents said lottery sales have decreased because more people have realized that the odds of winning are against them and that gambling is a bad investment, not because the

prize limit was lowered slightly. Also, the novelty has worn off, as has occurred in most states that have instituted a state lottery.

Raising lottery prize amounts only would entice more people to gamble and eventually would cost the state more as the problems inherent in gambling exerted both a social and financial toll. The state should not encourage more people to gamble by increasing lottery prize totals, even if it would mean more revenue for the state.

Other opponents said that the advertising budget penalties are unnecessary. The bill would force the Lottery Commission to decrease the payout or else work with a much smaller advertising budget, either of which would result in lost sales.

The **HRO analysis** appeared in the April 14 *Daily Floor Report*.

Temporary severance tax exemption for low-producing wells

SB 290 by Brown, et al.

Effective March 11, 1999

SB 290 temporarily exempts qualifying oil and gas wells from the severance tax under certain market conditions. Wells qualifying for the exemption produced no more than an average of 15 barrels of oil or 90,000 cubic feet (90 Mcf) of natural gas per day during the period October 1 to December 31, 1998. The exemptions are triggered for any month following three consecutive months when the average price of oil dropped below \$15 a barrel or the price of gas dropped below \$1.80 per million British thermal units (roughly \$1.80 per Mcf). The exemption expires September 1, 1999, or the last day of the month when the total amount of taxes exempted reaches \$45 million, whichever is earlier.

Supporters said SB 290 would provide emergency relief to small, independent producers who have been hit hardest by the worldwide downturn in oil prices. The governor declared the bill an emergency because these small operators and their employees needed immediate assistance. More than 80 percent of oil wells in Texas, accounting for about one-third of Texas' oil production, would be exempt from the oil severance tax under SB 290. For small producers operating near the breakeven point, the bill would lower costs to enable producers to keep marginal wells pumping. If wells are shut in, the state will lose severance taxes anyway. If shut-in wells are abandoned, the state even may have to spend tax dollars to pay for proper plugging. When wells are plugged, the state loses revenue permanently because it is not economical to redrill marginal wells. SB 290 also would help keep low-producing wells on the local property tax rolls.

Opponents said this special subsidy for the oil and gas industry would drain as much as \$45 million from state revenue that could be used for other priorities. Rather than granting a tax exemption and losing the revenue forever, the Legislature at least should consider allowing producers to defer payment of severance taxes until prices rebound and small wells become profitable again. Deferring the taxes still would reduce costs to producers now, when prices are low, but would require producers to pay the deferred taxes to fund other state priorities in the coming biennium, when prices are expected to recover.

The **HRO analysis** appeared in the March 10 *Daily Floor Report*.

Sales and franchise tax relief

SB 441 by Ellis, et al.

Generally effective October 1, 1999

SB 441 provides \$507 million in tax reductions for consumers and corporations during fiscal 2000-01. SB 441 exempts from the sales tax:

- non-prescription drugs and blood glucose monitoring strips, effective April 1, 2000;
- the first \$25 of monthly Internet access fees, effective October 1, 1999;
- 20 percent of the value of information services and data processing services, effective October 1, 1999;
- clothing and shoes costing less than \$100 during a three-day period in early August, effective June 3, 1999, with local taxing authorities allowed to opt out of this exemption starting January 1, 2000.

SB 441 authorizes local taxing authorities to repeal the application of a state sales and use tax exemption to a local sales and use tax. The governing body of a local taxing authority may repeal such an exemption by majority vote if the governing body holds a public hearing before the vote and if the state sales tax statute has been amended specifically to allow local taxing authorities to opt out of that exemption.

Effective January 1, 2000, SB 441 exempts corporations from the franchise tax for any year during which their gross receipts are less than \$150,000. The law also creates franchise tax credits for economic development activities throughout the state, particularly in “strategic investment areas” (SIAs). An SIA is a county with above-average unemployment and below-average per-capita income or an urban area that is federally designated as an urban enterprise zone. SB 441 provides franchise tax credits to corporations equal to:

- 4 percent of incremental research and development (R&D) expenditures until January 1, 2002, and 5 percent thereafter in all areas of the state;
- 6 percent of incremental R&D expenditures in SIAs until January 1, 2002, and 10 percent thereafter;
- 25 percent of wages paid for a minimum of 10 jobs created in SIAs, if the jobs pay at least 110 percent of the average county wage and are covered by health plans for which the corporation pays at least 80 percent of the premiums;
- 7.5 percent of certain capital investments of at least \$500,000 made in SIAs;
- 25 percent of wages for jobs created and 7.5 percent of certain capital investments made by agricultural processing corporations in counties with fewer than 50,000 residents;

- 50 percent of expenditures to establish and operate on-site day-care centers or to purchase off-site services for employees' children; and
- 30 percent of contributions to eligible before- and after-school programs for children aged five to 14.

The franchise tax credits individually may not exceed 50 percent of a corporation's total franchise tax liability, and no combination of credits may exceed the corporation's total liability. The day-care credit may equal as much as 90 percent of a corporation's total liability but may not exceed \$50,000. Certain unused credits may be carried forward into later tax reporting periods and used to offset future tax liability.

Supporters said SB 441 is a "Marshall Plan" to encourage investment, new businesses, and job creation in economically distressed areas throughout Texas, particularly along the Texas-Mexico and Texas-Louisiana borders. SB 441 would give money back to taxpayers through reasonable sales tax exemptions that benefit all Texans. It would strike a balance between providing responsible tax relief for Texas families and giving Texas businesses a boost to create new jobs, invest in Texas, and provide services for children.

Despite a growing economy, many Texas families are struggling to make ends meet. This bill would help poorer families in particular, because sales taxes take a higher percentage of their household income. SB 441 also would help Texas families by eliminating the sales tax on essential medications that all families buy. Growing children need new clothes and shoes every year, and most parents take them "back to school" shopping right before the new school year begins. Sales tax holidays in other states have been successful for consumers and retailers. Most retailers run promotions to coincide with the sales tax holiday, lowering costs to consumers even more and allowing retailers to clear their seasonal inventories. SB 441 also would support the goal of universal access to the Internet by removing Texas from the shrinking list of states that still tax Internet access and by reducing the sales tax on information and data processing services by 20 percent, an important first step toward a policy to sustain the state's high-tech economy.

SB 441 would be an effective, prudent use of state funds to spur economic development and job creation and would have positive ripple effects throughout the state economy. It would invest part of the current surplus to improve economic conditions in poorer counties, create new jobs, bring new businesses to Texas, and preserve the state's high-tech economy. It would reduce small businesses' costs of filing franchise tax forms and would exempt the smallest corporations from the tax altogether. The tax credit for R&D would afford the most bang for the buck. Study after study has shown that these types of tax credits produce substantial gains in gross state product, personal income, investment, and jobs. Texas is not keeping pace with other states in attracting research, but SB 441 would help Texas compete with other states for this important economic activity.

SB 441 would encourage corporations to create new jobs in areas with relatively high unemployment and low wages. The bill's simple, straightforward tax credit would attract new manufacturing facilities to Texas' most economically disadvantaged areas. SB 441 also would provide an incentive for employers to invest in high-quality child care for their employees and in before- and after-school programs to meet "latch-key" children's needs while their parents are at work.

Opponents said SB 441 would be a raid on future budgetary resources in the name of economic development and job creation. The bill would be a budgetary time bomb because of provisions requiring some credits to be claimed over several years and allowing firms to carry forward unused portions of credits, some for up to 20 years. Credits earned during times of a surplus could be claimed in years of budget deficits, which would force further tax hikes or budget cuts, all to pay for research, job creation, or investments that already had occurred. In a few years, as much as \$1 billion in unclaimed credits could be piled on the books.

Texas is still competitive with other states and does not need to enact a series of corporate tax cuts to attract and retain businesses. R&D tax credits reward firms for engaging in investments they would engage in without the credit. There is scant evidence to suggest that such credits actually bolster the economy, persuade firms to relocate, or increase employment. SB 441 proposes overly broad tax credits for job creation and capital investment that would reward businesses already located in Texas and would subsidize business decisions that would be made without the credits. Franchise tax credits provided to corporations for job creation should be used to subsidize the costs of worker training and additional education, such as community college courses or technical schooling, and not just to hire the worker. A corporation should not receive tax credits for upgrading existing plant or equipment or for altering its productive capability if those changes do not result directly in new jobs or in higher wages.

Taxes should not be reduced until schools, health care, and human service programs are fully funded. Texas has substantial unmet needs in all those areas. If the Legislature determines that a tax cut is desirable, broad-based tax-rate reductions would produce more benefits for the state economy in terms of job creation and capital formation in relation to the revenue the state would lose. All Texans have contributed to the state through higher taxes, and all Texans should share fairly in a tax cut.

Notes: Other legislation considered during the 1999 legislative session contained provisions ultimately included in SB 441:

- HB 2280 by Dutton (sales tax holiday for clothing and shoes);
- HB 2372 by Gutierrez (sales tax exemptions for non-prescription medications);

- HB 551 by Goolsby (franchise tax exemptions for small corporations); and
- SB 5 by Sibley (franchise tax credits for economic development activities).

The **HRO analysis** of SB 441, as substituted by the House Ways and Means Committee, appeared in Part One of the May 24 *Daily Floor Report*. The analyses of HB 2280, HB 2372, and HB 551 appeared in Part One of the May 6 report, and the analysis of SB 5 appeared in Part One of the May 24 report.

Sales and property tax exemptions for timber

SB 977 by Ratliff, et al.

Generally effective September 1, 1999

SB 977 provides new sales-tax exemptions for machinery, equipment, and materials used in timber production, exempts timber products from ad valorem taxation, and creates a new restricted-use timber land appraisal process to reduce property taxes for certain tracts of timber land. The sales-tax exemptions will be phased in through 2008. SB 977 extends the property tax exemption for farm products to include timber. Standing timber and timber that has been harvested but still is located on the real property from which it was harvested are exempt from property taxes, as are implements of husbandry used in timber production. Property taxes for restricted-use timber lands are reduced by 50 percent for a period of 10 years. These reductions apply to land where timber is *not* harvested for aesthetic or conservation purposes, to provide habitats for endangered or threatened wildlife, to protect water quality, or to reforest harvested land. Additional taxes will be imposed if the use of this land changes.

Supporters said SB 977 would bring the taxation of timber more into line with the taxation of other forms of agricultural production. It would provide reasonable, affordable incentives for Texans and timber businesses to invest in reforestation, conservation, and development. It could provide an economic climate for expanding investment and creating jobs in the Texas timber industry. SB 977 could help slow down the importation of wood from other states, Canada, and South America, where economic incentives have lured timber companies to relocate their operations. The tax exemptions would be phased in to reduce their immediate impact on local taxing units and the state.

Opponents said the property and sales-tax exemptions proposed by SB 977 should be permissive, not mandatory. Individual taxing units and appraisers ought to be able to decide whether to appraise certain properties as restricted-use timber lands. Also, to lessen the potential harm to local finances, the bill should allow local governments to retain their local sales tax revenues. The bill would hit hard a small number of East Texas school districts. These districts can afford to lose no revenue, and SB 977 would reduce the amount of property on which they could raise taxes to make up the shortfall. If the bill were enacted, the state would need to hold harmless all affected school districts in all years, as it has held districts harmless for the mandatory \$10,000 homestead exemption enacted in 1997.

The **HRO analysis** appeared in Part Two of the May 19 *Daily Floor Report*.

Transportation and Motor Vehicles

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Ban on open containers of alcohol in vehicles

HB 487 by Hill, et al.

Died in the Senate

HB 487 would have eliminated the current requirement that a person committing the offense of consuming an alcoholic beverage while operating a motor vehicle in a public place must be observed in the act by a law enforcement officer. HB 487 also would have made it a Class C misdemeanor, punishable by a fine of up to \$50, for an occupant of a motor vehicle to consume alcohol or to possess an open container of alcohol in the passenger area while the vehicle was located on a public highway or a public highway right-of-way. A defendant would have had an affirmative defense if the defendant did not own or was leasing the vehicle and did not know that the open container was in the vehicle or if the person consuming the beverage or possessing the open container was a passenger in the living quarters of a house coach or trailer or a passenger in a vehicle meant for transporting persons for compensation.

HB 487 also would have increased penalties and established new offenses for operating a vehicle while intoxicated. The minimum time that driver's licenses would have to be suspended for persons who committed certain repeat alcohol-related offenses would have been increased from 180 days to one year. Driving, flying, or boating while intoxicated with a blood alcohol concentration of .15 or higher would have been a Class A misdemeanor. HB 487 also would have made intoxication assault that caused a pregnant woman to suffer a miscarriage a second-degree felony. It would have made a person causing a pregnant woman to suffer a miscarriage due to an intoxication assault liable for civil damages and potentially liable for compensatory and exemplary damages (see also SB 188).

Supporters said HB 487 would help save lives on Texas roadways by getting tougher with drunk drivers. Current law requires that a law enforcement officer actually witness a driver in the act of drinking. This is difficult to enforce and leaves the false impression that alcohol and driving are acceptable if not observed. HB 487 would not restrict an individual from carrying an open container of alcohol in a vehicle, as long as the container was placed in an area not designed for seating the driver and passengers and was not readily accessible to either.

If Texas does not have an open container law in place and enforced by October 1, 2000, about \$20 million in federal funds will have to be diverted from construction to traffic safety programs annually in fiscal 2000 and 2001. After that, the amount will increase to about \$41 million annually. Texas cannot afford to lose money that could be spent on needed road projects.

HB 487 also would help address the problem of repeat intoxicated drivers by providing tougher penalties for certain repeat offenses. About one-third of all drivers arrested or convicted of driving while intoxicated or driving under the influence are repeat offenders who have a greater risk of involvement in a fatal crash. Also, increasing the penalty for intoxication assault that caused a miscarriage and allowing persons to recover civil damages would match the punishment for these offenses with the seriousness of the offense.

Opponents said Texas already has strict laws that prohibit persons from driving while intoxicated and to punish severely those who do. Those who do not break these laws — especially passengers — should not have their freedom restricted. Restricting all open containers would be an unwarranted intrusion of the government into individual behavior, allowing law enforcement officers to ticket or arrest a passenger in a vehicle merely for drinking a beer when the focus should be on whether the driver was impaired.

Texas will not lose federal dollars if HB 487 is not enacted. The funds simply will be redirected to other highway safety-related programs.

The provisions on miscarriage would go too far. Penalties should not be enhanced for intoxication manslaughter based on the status of the victim. Some of the penalties that would be imposed by HB 487 would be too harsh. For example, the bill would require mandatory year-long suspensions of certain repeat offenders' drivers licenses. This could prevent a person from getting to work or to a meeting with a probation officer or to other crucial activities.

Notes: HB 487 passed the House on May 12 but died when it was tagged in the Senate Criminal Justice Committee. HB 3555 by Wilson, which would have made various revisions to the Alcoholic Beverage Code and also included an open container provision, with additional exceptions, also passed the House on May 12 but died when tagged in the Senate Administration Committee. On May 20, the Senate approved SB 128 by Nelson, et al., which would have prohibited open containers of alcohol in motor vehicle passenger areas while the vehicle was located on a public highway or a public highway right-of-way. SB 128 died in the House Calendars Committee.

The **HRO analysis** of HB 487 appeared in Part Two and the analysis of HB 3555 appeared in Part One of the May 11 *Daily Floor Report*.

Allowing cities to implement photographic traffic-monitoring system

HB 1152 by Driver, et al.

Died in the House

HB 1152 would have allowed a municipality in a county with a population of at least 150,000 or in a contiguous county to implement a traffic-control monitoring system to photograph the license plate of a vehicle that ran a steady red light. Persons committing a red-light offense recorded by a photographic traffic system would have been subject to civil penalties.

Supporters said the bill would make drivers more responsible by discouraging them from running red lights. Cities should have tools to stop motorists who ignore their responsibilities and endanger others. Disregarding red lights is the leading cause of urban crashes and fatalities. Each year in Texas, more than 17,000 traffic accidents occur in which a person disregards a red light. In many cases, police officers cannot chase a driver who has run a red light without also running the light themselves. Red-light violations therefore are difficult to enforce, especially in the most dangerous intersections. In the more than 20 cities around the country where photographic traffic systems are in use, red-light violations have dropped as much as 40 percent.

Citations would be civil penalties like parking tickets. A penalty would not constitute a violation and would not affect a person's insurance premiums or driving record. Being arrested or fined for an offense committed on a public street is not an invasion of privacy. The purpose of these cameras would be to ensure public safety, not to intrude on people's private lives or to raise funds for police.

Opponents said police should not be in the business of arbitrarily monitoring private lives. If cameras are used today to catch people who run red lights, they could be used in the future to survey even the pettiest crimes. Also, the bill could not be enforced fairly.

Most people who run steady red lights do not do so intentionally. Many violations occur because the lights are timed poorly or inconsistently. Furthermore, a motorist caught on camera running a red light would receive a civil penalty, while a motorist caught by an officer for the same offense would be subject to a misdemeanor offense. Since cities more likely would place cameras in the most dangerous intersections, drivers who committed the offense where it could cause the most harm would receive lesser penalties than those who committed the offense elsewhere. Also, implementation of these systems could be motivated more by financial concerns than by public safety.

Notes: A floor amendment passed by the House would have required photographic traffic systems to have an accompanying notice reading, “Big Brother is watching you!” Other floor amendments would have reduced civil penalties, limited the amount of revenue a municipality could collect, and deemed photocopies of currency acceptable payment for citations.

The **HRO analysis** appeared in Part Two of the April 21 *Daily Floor Report*.

Increasing daytime maximum speed limit on rural highways

HB 3328 by Gallego, et al.

Died in conference committee

HB 3328 would have increased the daytime maximum speed limit to 75 miles per hour (mph) on state and federal highways outside urban districts that already have a daytime maximum speed limit of 70 mph. The bill would have increased the daytime limit to 80 mph on east-west interstate highways in counties with populations below 25,000. The speed limit increase would have applied only to passenger cars, motorcycles, cars and light trucks towing trailers less than 26 feet long, and cars and light trucks towing trailers designed and used to transport dogs or livestock. The speed limit increase would have taken effect only if the Texas Department of Transportation (TxDOT) determined that it was appropriate for the highway or portion of the highway in question.

Supporters said increasing the speed limit on rural highways would save considerable time for those traveling long distances. Ten other western states, including Oklahoma and New Mexico, have adopted a 75 mph rural highway speed limit. Citizens in these states strongly support the higher limit, and no evidence of an increase in traffic accidents, injuries, or fatalities has been reported. The bill would not adversely affect the safety of highway drivers. TxDOT would review every request to increase the speed limit to ensure that it was appropriate for the particular highway.

Opponents said a speed limit of 75 or 80 mph could lead to more accidents, injuries, and fatalities on Texas highways. Faster vehicles are harder to control and cause greater damage when accidents occur. Permitting higher speeds on some highways could encourage unsafe driving on highways unaffected by the increase. Raising the speed limit also could lead to greater fuel consumption, since automobile fuel efficiency decreases at higher speeds.

Notes: **HB 676** by Isett, which allows commercial trucks to travel at the same daytime maximum speed as passenger cars on certain highways, takes effect September 1, 1999.

The **HRO analysis** of HB 3328 appeared in Part Two of the April 20 *Daily Floor Report*. The analysis of HB 676 appeared in the April 22 *Daily Floor Report*.

Lowering blood alcohol content that defines intoxication

SB 114 by Gallegos, et al.

Effective September 1, 1999

SB 114 lowers from 0.10 to 0.08 grams per deciliter the blood alcohol concentration that defines intoxication in the Penal Code.

Supporters said lowering the blood alcohol content for a person to be considered intoxicated would make driving illegal for persons who had consumed enough alcohol to impair their driving performance. This would help prevent drunk driving by making people more cautious about driving after drinking alcohol and by raising the perceived risk of being arrested for driving while intoxicated (DWI). It also would make it easier to prosecute drunk drivers with a lower blood alcohol content. This would save lives and money and would prevent injuries from alcohol-related accidents.

As blood alcohol content increases, drivers' abilities are impaired. This can result in problems with attention, reaction time, speed control, braking, steering, lane tracking, judgment, and more, substantially increasing the risk of a crash. SB 114 would not stop someone from having a beer with pizza after work or a glass of wine with dinner, nor would it criminalize social drinking. Texans would be free to drink as much as they wanted. SB 114 would relate only to *driving* while intoxicated.

Texas, like other states, always has had a benchmark to define intoxication rather than relying on a more general definition. Setting that benchmark at 0.08 would be a reasonable, prudent change from current law that would not interfere with Texans' ability to enjoy alcohol responsibly.

Enacting a 0.08 standard would allow Texas to qualify for National Highway Safety Administration grant money of up to \$12.4 million, which the state could use for highway safety or construction projects. If Texas had had a 0.08 law in 1998, the state could have received \$8.5 million in federal grant funds.

SB 114 would not increase the burden on law enforcement officers, prosecutors, or the courts. Police still would have to have reasonable suspicion before stopping a driver and have probable cause to arrest. Prosecutors should be able to handle the approximately 4,328 additional cases or actions projected to result from this bill. On this criminal justice issue, as on others, the Legislature should be concerned with setting public policy and should let prosecutors deal with any increased workload. In fact, the stronger message sent against DWI would deter violations and ultimately reduce prosecutions.

Opponents said lowering the legal blood alcohol level from 0.10 to 0.08 could result in unfair convictions of persons who may have been drinking alcohol but were not necessarily intoxicated. Current law sets the legal blood alcohol content at a level at which it is reasonably sure that the vast majority of persons would be intoxicated and their driving abilities and response time impaired. At the 0.08 level, many persons could retain normal use of their mental or physical faculties. However, SB 114 would deem them intoxicated *per se* without considering whether their abilities were impaired. This would come dangerously close to criminalizing drinking alcohol rather than criminalizing committing a specific act while intoxicated.

SB 114 is unnecessary because current law also defines “intoxicated” as not having the normal use of mental or physical faculties. Persons who met this definition at 0.08 blood alcohol content or any other level could be convicted of an intoxication offense without a change in the law.

SB 114 could overburden prosecutors with an increase in DWI cases, especially since defendants often choose to go to trial rather than plea bargain in these cases because of the stiff penalties. It is sometimes difficult for prosecutors to get convictions for DWI at the current level of 0.10, and SB 114 could make convictions even harder because many persons with a 0.08 alcohol level might not appear in videotapes to be impaired and might perform well on standard tests of physical abilities.

Other opponents said lowering the legal blood alcohol content should be coupled with other changes, such as allowing deferred adjudications in these cases.

The **HRO analysis** appeared in Part Two of the May 10 *Daily Floor Report*.

Grant Anticipation Revenue Vehicle bond funding for highways

SB 966 / SJR 45 by Lucio, et al.

Died in House committee

SB 966 would have allowed the Texas Transportation Commission to issue general-obligation bonds to issue Grant Anticipation Revenue (GARVEE) bonds secured by current and future highway funding from the federal government. The commission would have had to give priority to the use of the bond proceeds for transportation and infrastructure projects related to the North American Free Trade Agreement and to complete the Texas trunk highway system. The maximum annual debt service in any fiscal year for state bonds could not have exceeded 15 percent of the amount received in the preceding year from the federal government. The Sunset Advisory Commission would have had to evaluate the bond program before September 1, 2002, and the Texas Transportation Commission would have had to report every two years on the use and effectiveness of the bonds.

SJR 45 would have proposed a constitutional amendment for the November 2, 1999, ballot to allow the state to issue the general-obligation bonds proposed in SB 966 until September 1, 2003.

Supporters said issuing GARVEE bonds would allow Texas to accelerate use of up to \$3 billion in federal highway funding for building high-priority road projects. Traffic congestion on international trade routes, especially in the Texas-Mexico border region, is a serious impediment to free trade throughout the state. According to the comptroller's Texas Performance Review, bond funding would be an effective method to relieve road congestion and improve economic efficiency by allowing the state to begin large-scale road construction projects much sooner than under traditional funding methods. The interest on the bonds that the state would have to pay for meeting its immediate needs would be significantly less than the increase in future construction costs if the state waited to build badly needed roads.

Opponents said the state should not issue bonds for road construction when the source of repayment is uncertain. There is no guarantee that the federal government will follow through with its highway funding commitments. Bond funding would be more expensive in the long term than the current pay-as-you-go system because the state would have to pay the interest on bonds along with the costs of road construction itself.

Utilities

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Regulating telephone solicitation

HB 537 by Danburg, et al.
Died in Senate committee

HB 537 would have established a statewide telephone solicitation no-call list, prohibited telemarketing on Sundays, required registration of certain entities, and expanded tools for enforcing compliance. The Public Utility Commission (PUC) would have had to maintain the no-call list at no charge for Texas residential customers who asked to be on the list. The no-call list and updates would have been free to solicitors registered with the secretary of state and would have been available to them in braille. For others, the cost would have been \$200 for each list and update.

A solicitor who called someone on the list could have faced administrative penalties, including a \$5,000-per-day fine. Numerous entities would have been exempt from the no-call list provisions, including higher education institutions, nonprofit organizations, organizations calling for political purposes, securities and insurance brokers, veterans and charitable organizations, and solicitations made in connection with existing debt. Also, calls by a solicitor with an established business relationship with the called person would have been exempt.

The bill would have required registration of entities currently not required to register, including local and long-distance telephone companies, financial institutions, media and subscription services, businesses that resell items for recycling, reuse or manufacturing, and solicitors of cable television services, catalogues, and food sales. These entities would have had to pay a \$75 registration fee, post a \$25,000 bond (up from \$10,000), and abide by the no-call list provision. The attorney general would have been authorized to bring an action in the name of the state to recover against the bond and to recover attorney's fees and investigative costs for violations of the no-call list.

Supporters said telemarketing is a legitimate business practice, but some unscrupulous individuals are using high-pressure, deceptive tactics to scam Texans out of their hard-earned money. Telemarketing fraud victimizes people of all ages, ethnic groups, educational backgrounds, and income levels. Fraudulent telemarketers often target the elderly, and more than three-quarters of telemarketing victims are over 55. According to the PUC, hundreds of complaints have been lodged by customers who have asked to no avail for telemarketers to stop calling them. A no-call list would protect consumers who do not want to receive unsolicited telephone calls.

A statewide no-call list would not unduly limit a company's ability to market to prospective customers, nor would it limit opportunities for consumers receptive to

receiving calls about certain products, because the only names on a no-call list would be individuals who did not want to be contacted with unsolicited offers.

Opponents said HB 537 would place overly burdensome restrictions on legitimate telemarketers that already comply with federal and state laws and would restrict their ability to market to new consumers. The increased bonding requirement would be onerous for smaller companies. The bill would not prevent fraudulent telemarketing, because the “bad actors” probably would not register, pay the bond, or abide by any other law.

No-call lists should continue to be maintained by each separate business entity, as required by federal law. In-house no-call lists are a much more efficient way to protect customers from being contacted by specific companies. A better alternative would be to increase efforts to educate Texas consumers about fraudulent telemarketing practices. Consumers may not be aware that they can ask to be placed on a specific company’s no-call list. Besides, consumers who put their numbers on a no-call list still could be contacted by all the entities that would be exempt under the bill.

In 1996, the governor of Rhode Island vetoed a telephone solicitation bill on the grounds that it was probably unconstitutional under the First Amendment because it could infringe unreasonably on the rights of companies to communicate their messages by telephone. He also stated that the legislation violated interstate commerce laws by restricting out-of-state telemarketers engaging in interstate commerce.

If consumers want to screen all of their calls, caller identification devices are a better solution. If consumers continue to receive calls from companies with which they are not familiar, they should assume that the calls are fraudulent and report complaints to the PUC.

The **HRO analysis** appeared in the May 10 *Daily Floor Report*.

Telecommunications provider compensation for right-of-way use

HB 1777 by Wolens, Carter
Effective September 1, 1999

HB 1777 establishes a uniform method for compensating municipalities for the use of public rights-of-way by telecommunications providers. Municipalities will receive as a base franchise fee the total amount of revenue received in 1998 from franchise, license, permit, and application fees from providers. Municipalities with fewer than 15,000 residents without franchise agreements as of the law's effective date or involved in litigation over franchise agreements are given alternative methods to establish a base fee.

The Public Utility Commission (PUC) must establish categories of access lines based on the type, use, and function of the lines and must establish monthly rates for each line category, including for in-kind services. The PUC must ensure that rates among different providers are competitively neutral, do not impair competition, are nondiscriminatory, and comply with state and federal law. The PUC must adjust access-line rates annually based on the change in the Consumer Price Index. Providers must pay franchise fees to municipalities based on the actual number of access lines, but they do not have to pay for access lines that are resold or otherwise provided to another provider.

Municipalities have the right to exercise any regulations for their rights-of-way that are consistent with state and federal law and that are not precluded specifically by HB 1777. Municipalities are immune from any legal responsibility resulting from harm caused by the provider or by an employee or representative of the provider, but they are not immune from responsibility for injuries, death, or property damage caused by the municipality or a municipal employee.

Supporters said the bill was a compromise between cities and telecommunications providers that would serve the best interests of Texas citizens. Providers would benefit from a standardized method for determining franchise fees, clear principles for establishing new franchise agreements, PUC oversight of the competitive neutrality of franchise fees, and exemption from city ordinances related to public rights-of-way. Cities would benefit from the guarantee of minimum fee revenues, reasonable increases in future fee revenues, compensation for in-kind services, retention of important police powers over public rights-of-way, and legal indemnity from the actions of telecommunications providers.

Opponents said the state should establish a cost-recovery method for determining franchise fees, because many fees charged by cities under the current "gross receipts" method have nothing to do with the use of public rights-of-way.

Other opponents said that the bill would limit the ability of cities to regulate the use of public rights-of-way through ordinances and would give the PUC too much control over setting monthly rates based on access-line categories.

The **HRO analysis** appeared in Part One of the May 10 *Daily Floor Report*.

Restructuring the electric utility industry

SB 7 by Sibley, et al.

Effective September 1, 1999

SB 7 restructures the electric utility industry in Texas to provide retail competition in power generation and customer choice of electricity providers beginning January 1, 2002, for all customers now served by investor-owned utilities. By the start of competition, each existing utility must separate its business activities into a power generating company, a retail electricity provider, and a transmission and distribution (T&D) utility. T&D operations will remain regulated by the Public Utility Commission (PUC). Municipally owned utilities, electric cooperatives, and river authorities will be able to choose when to enter the competitive market.

Utility companies must freeze electric rates from September 1, 1999, through December 31, 2001. After that, residential and small commercial customers will receive a rate cut of 6 percent, called the “price to beat.” A retail electricity provider affiliated with a former monopoly utility will not be allowed to charge these customers rates higher than its price to beat for five years, except to reflect major fuel-price fluctuations. Affiliated retail electricity providers will not be allowed to compete in their affiliated T&D service areas until 40 percent of their residential and small business customers are being served by alternative providers, or until 36 months after competition begins, whichever comes earlier.

To guarantee that residential customers will have a choice of providers, SB 7 requires an electricity provider to sell at least 5 percent of its energy load to residential customers. A provider that does not meet this requirement must pay into a system benefit fund. All customers also will pay a fee on their electric bills that goes into the system benefit fund. This fund will be used to lower electric rates for low-income people, to set up customer education programs, and to reimburse school districts for property-tax losses due to restructuring.

A retail electricity provider seeking reimbursement from the system benefit fund must charge eligible low-income customers a reduced rate of at least 10 percent less than the price to beat, up to 20 percent less if sufficient money is available in the system benefit fund. An electricity provider may not cut off a customer for nonpayment on a weekend or during an extreme weather emergency.

SB 7 allows utilities to recover 100 percent of their stranded costs — unrecoverable costs still owed for long-term investments, including contracts at unfavorable rates and debt for high-cost power plants. Utilities will add a competitive transition charge to electric bills to recover these costs. The PUC will hold a hearing two years after competition begins to

make a final determination of total stranded costs in comparison with utilities' initial estimates of stranded costs. If the PUC decides during this "true-up" hearing that a utility has been paid too much or not enough, the PUC may modify the utility's T&D rates or may use other mechanisms to reach the correct amount.

Stranded costs generally will be allocated among residential and business customers through a formula based in part on the way the PUC allocated costs of assets in its most recent rate order for the utility.

SB 7 allows utilities to include in their stranded cost totals the costs they incur before January 1, 2002, for reducing air pollution. It also requires all owners or operators of power plants to apply to TNRCC for air-contaminant emissions permits by September 1, 2000, or be shut down by May 1, 2003, unless TNRCC finds good cause for an extension. The permit will require the facilities to eliminate 50 percent of their 1997 emissions of nitrous oxides and 25 percent of their 1997 emissions of sulphur dioxide.

The law also allows utilities to recover stranded costs by issuing bonds to be paid by utility customers, called securitization. The PUC must ensure that securitizing utility debt provides benefits to ratepayers greater than the benefits that would have been achieved without this refinancing method.

On the date competition begins, a power generating company may not own and control more than 20 percent of the installed generating capacity located in or capable of delivering electricity to a power region. Furthermore, each power generating company affiliated with a former monopoly utility must sell at least 15 percent of its installed generating capacity and must continue to sell capacity until 60 months after competition starts, or until 40 percent of its small business and residential load has moved to alternative providers, whichever is earlier. The PUC will have the authority to monitor abuses of market power and to provide remedies.

SB 7 sets a goal of phasing in an additional 2,000 megawatts of generating capacity based on renewable sources by January 1, 2009. Renewable sources include solar, wind, geothermal, hydroelectric, wave or tidal energy, or biomass products. The law states the Legislature's intent that 50 percent of the generating capacity installed in Texas after January 1, 2000, be fueled by natural gas.

SB 7 charges an independent system operator (ISO) with establishing and enforcing procedures to ensure the reliability of the regional power network. The ISO must account for the production and delivery of electricity among generators and all other market participants. ISO procedures will be subject to PUC oversight and review.

SB 7 requires the PUC to provide protections for retail customers before competition begins on January 1, 2002. The PUC will maintain a “no call” list for utility customers who do not want to be contacted by telephone solicitors about electric service. The PUC also must develop and implement an educational program by January 1, 2001, to inform customers about choice of electricity providers.

Supporters said a competitive market would lead to lower electric rates for all customers in Texas, better response to customers, increased business efficiency, and a more attractive business environment. Many new providers want to compete in Texas and potentially could offer electricity at a lower price than is available in a monopoly market. The benefits that competition would bring in terms of lower rates would far outweigh any temporary charges included on electric bills to cover the costs of making the transition to the new competitive market.

The final version of SB 7 would allocate stranded costs fairly among all classes of electric customers. Under the complex allocation formula, residential customers, in effect, would pay for as much as 42 percent of stranded costs, and business customers would pay about 58 percent. The bill would provide for a “true-up” procedure whereby the PUC could determine whether utilities’ estimates of stranded costs had been too high or too low. The PUC would have to analyze actual stranded costs using market-based methods and to adjust regulated T&D rates to ensure that companies do not collect too much or too little from customers for these costs.

SB 7 would guarantee that residential and small business customers would benefit from restructuring with lower electric rates and could choose from among alternative providers. The bill also would ensure that electric rates would not go up for five years. By requiring all retail providers doing business in Texas to sell at least 5 percent of their electricity to residential customers, the bill would prevent providers from “cherry-picking” more profitable business customers, leaving residential customers behind.

The entire state would benefit from the cleaner air that would result from emissions reductions mandated in the bill. SB 7 would require power plants to cut an amount of emissions equivalent to the emissions produced by as many as four million cars.

Securitization would benefit consumers by allowing the refinancing of debt at lower interest rates in much the same way that homeowners refinance their mortgages. This could save substantial amounts over the long term.

Even though they use less electricity than do other residential customers, Texans with incomes at or below 125 percent of the federal poverty level spend much higher portions of their total incomes on utility payments. SB 7 would ensure that low-income Texans

could get electricity at affordable rates. The fee for the system benefit fund would raise between \$100 million and \$180 million per year to aid low-income customers.

SB 7 would maintain the reliability of Texas' electricity system by continuing state regulation of T&D.

An overwhelming percentage of electric customers in Texas want more of their electricity to come from renewable sources. SB 7 would require electricity providers to derive a specific amount of power from renewable sources, increasing that amount over the next 10 years.

SB 7 would give the PUC ample authority to establish consumer safeguards. The bill also would ensure that customers would get all the information they need in language they understand in order to choose among electricity providers.

Opponents said electric utility restructuring is still an experiment and so far has not lowered electric bills for residential customers over the long term. In other states that have restructured the utility industry, only large industrial customers have benefitted. Savings to residential ratepayers from competition would be minimal because of the additional charges on their electric bills associated with the transition to competition.

This is not a good time to restructure in Texas. Texas consumers are on the verge of receiving lower rates under today's regulated monopoly system. Utility fixed costs are declining as the major companies have been paying off the high cost of nuclear plants, and other costs are going down as well. Freezing rates at their current levels would mean that customers would have to pay more under SB 7 than they would pay otherwise under the current system of state regulation.

Stranded costs for unprofitable generating plants, mostly nuclear plants, are estimated at about \$4.9 billion at the start of competition. SB 7 also would force customers to pay an additional \$600 million to clean up old generating plants by allowing utilities to include costs of improvements to air quality in their stranded cost totals. The utilities have escaped laws to require them to comply with clean air standards for nearly 30 years, and they should have to pay to upgrade outdated plants themselves.

Securitization would provide a large sum of windfall cash for an incumbent utility at the start of competition. The utility could use this special advantage for anticompetitive purposes.

Provisions in SB 7 actually could decrease competition in Texas. The "price to beat" would prevent a retail electricity provider affiliated with an investor-owned utility from offering a competitive price to residential and small business customers. This would deny

residential and small business customers lower prices and innovative pricing plans from an affiliated provider. Requiring retail electricity providers to sell at least 5 percent of their load to residential customers would discourage new providers from doing business in Texas at all.

The system benefit fund would cost more than \$100 million per year to subsidize rates. Electric rates in Texas already are lower than the national average. Subsidizing rates for some people would increase the cost for everybody else.

The existing transmission system is not designed for retail competition. With more players in the market, regulators would find it harder to monitor companies to make sure they met reliability standards. The increased number of market participants competing to provide low-cost service could make it difficult to ensure sufficient reserves of generating capacity to meet customer needs. This bill would not provide enough lead time, because planning for transmission facilities takes from five to ten years. Under SB 7, retail competition would begin in less than three years.

All electricity generation should be based on the market. Renewable energy is more expensive and therefore is not a cost-effective way to produce energy. Requiring utilities to use this more expensive energy would increase electric rates for customers. Also, wind and solar plants cannot produce the same amount of energy as more traditional types of generating plants.

The **HRO analysis** appeared in Part One of the May 20 *Daily Floor Report*.

Telecommunications and electric service customer protections

SB 86 by Nelson, et al.

Effective August 30, 1999

SB 86 generally authorizes the Public Utility Commission (PUC) to make and enforce all rules necessary to protect customers of electric services and telecommunications. The law protects these customers from unauthorized switching of providers (“slamming”) and from charges for unauthorized services or products (“cramming”). The PUC or the appropriate municipally owned utility must adopt rules and enforce penalties that prohibit deceptive or anticompetitive marketing practices, provide clear identification of each provider with charges on each bill, and remedy unauthorized service changes.

A customer is not liable for charges incurred during the first 30 days after an unauthorized change of carriers. A billing utility must remove unauthorized charges and deal with the service provider for the customer. The PUC may resolve disputes between customers and service or billing providers, and the resolution process may take no more than 60 days. Utility companies no longer may escape PUC penalties by taking corrective action within 30 days. For repeated violations, the PUC may revoke a provider’s certificate or registration and may order a billing utility to terminate billing services for a service provider. Rules adopted by the PUC to enforce cramming laws may not be more burdensome than applicable federal laws and rules.

SB 86 also creates a customer bill of rights, including the right not to be slammed or crammed, to choose services and providers, not to be discriminated against, to privacy for credit and consumption information, to prompt resolution of disputes, to low-income assistance programs, and to clear and understandable bills. The PUC must adopt and enforce industry standards on information provided a consumer and must promote public awareness of the electric and telecommunications markets to help people make informed decisions.

SB 86 prohibits a provider of basic local telephone service from discontinuing that service to a residential customer because the customer failed to pay charges for long-distance service. The PUC must adopt rules by January 1, 2000, to prevent customer abuse of this protection.

Supporters said SB 86 would enable the PUC to crack down on telecommunications companies that bill customers for unauthorized charges. The bill also would apply to the electricity industry, which will be ripe for this type of deceptive marketing now that the Legislature has opened that industry to competition. The bill would direct the PUC to adopt rules and procedures for stopping these practices and would authorize the agency to develop new rules as companies come up with new ploys to try to beat the system. In

addition, this legislation calls for a consumer awareness campaign and includes a utility consumer bill of rights.

SB 86 would provide the authority and guidelines for the PUC to carry out its major new role of a fair-trade “traffic cop” in a competitive utility market. This bill would put customers first and would ensure consumer protection without creating obstacles that would hinder participation in the market by either customers or providers. By removing the “30-day cure” and providing authority for the PUC to suspend and revoke certificates or registrations, the bill would make it possible to prevent the repeat “bad actors” from doing business in Texas.

SB 86 would ensure quick relief to customers. The multiple-step billing process involves the customer, billing utility, billing agents, and the actual service provider. The billing utility generally is the most accessible and reliable link in that chain for the customer. It would make sense, therefore, for the billing utility to bear some responsibility to help locate the violating service providers and to help customers rectify unauthorized charges. Southwestern Bell is doing this voluntarily now, which has proven very effective.

Opponents said the bill would grant far too much enforcement authority to the PUC. The attorney general already has the authority to enforce laws against deceptive trade practices and fraud. The billing utility should not be responsible for accommodating a customer that it did not wrong. That responsibility should rest with the service provider that initiated the unauthorized charges.

Other opponents said the bill’s provision that PUC rules could not be more burdensome than federal regulations would strip the bill of its effectiveness. The Federal Communications Commission specifically has deferred to the states in certain areas of customer protection. Texans should have the best of both worlds: federal protection when that is more aggressive and state protection when the federal government has not acted.

The **HRO analysis** appeared in Part Two of the May 19 *Daily Floor Report*.

Telecommunications regulation and competition

SB 560 by Sibley, et al.

Effective September 1, 1999

SB 560 revises the 1995 telecommunications regulatory statute to open local telephone service to competition by setting ground rules for fair billing and pricing, adding new consumer-protection measures, revising Public Utility Commission (PUC) regulatory power, and changing access rates charged to long-distance companies by local exchange companies. It also repeals requirements that new competitors for local phone service make major investments in new facilities and infrastructure and extends the PUC's sunset date from 2001 to 2005.

SB 560 prohibits excessive charges for access to long-distance service. An incumbent local phone company with more than five million access lines — that is, Southwestern Bell (SWB) — must reduce switched access rates charged to long-distance companies by 1 cent on September 1, 1999, and by an additional 2 cents by July 1, 2000, or when the Federal Communications Commission allows the incumbent company to enter the long-distance market, whichever is earlier.

SB 560 allows disbursements from the universal service fund (USF) to make up for a portion of reduced access rates for incumbent local exchange companies. Generally, if a company reduces its rates after receiving USF disbursements, the PUC may not reduce that company's USF disbursements. The USF is funded by all telecommunications providers, some of whom add a surcharge on every phone bill to finance the USF. The fund supports low-income and disabled customers and provides limited support for customers in rural areas with a high cost of service.

Companies competing with incumbents in the local service market may not charge long-distance providers higher access rates than rates charged by incumbents, absent PUC approval. The law requires long-distance companies with more than 6 percent of intrastate long-distance service access minutes to pass through access-charge reductions to customers.

SB 560 caps rates on basic local service provided by companies under incentive regulation, those choosing not to be regulated in a traditional manner by the PUC. The caps will extend through September 1, 2005.

An incumbent local phone company may introduce new services, make price changes permissible under the legislation, and group services in packages for marketing purposes after giving 10 days' notice to the PUC, the Office of Public Utility Counsel, and all competing carriers in the area. New services must be priced at or above the long-run

incremental price of providing them. SB 560 prohibits discounting or other forms of setting prices that are discriminatory, predatory, or anticompetitive.

SB 560 prohibits SWB and GTE from offering special service contracts tailored to the needs of individual customers until September 1, 2003, or until 40 percent of their customers have switched to other companies for those services, whichever is earlier. The affiliate of an incumbent company with more than five million access lines (SWB) may not use these special contracts so long as the incumbent company itself may not do so.

SB 560 allows the affiliate of an incumbent local phone service provider to operate in the same territory as the incumbent. However, it prevents the affiliate from selling to a non-affiliate any regulated product or service purchased from the incumbent at a price less than the price paid to the incumbent. Affiliates of incumbent companies and SWB may offer certain service packages, discounts, and promotions to federal, state, and local governments that the companies are prohibited from offering in the private market until competition is fully established.

SB 560 includes consumer-protection provisions found in SB 86, also enacted by the 76th Legislature, including protections against slamming (unauthorized switching of companies) and cramming (adding unauthorized charges to phone bills). The law requires both incumbent local phone companies and competing companies to provide certain advanced telecommunications services, plus caller ID and custom calling services, in rural areas at prices reasonably comparable to the prices for these services provided in urban areas, beginning September 1, 2000.

By March 1, 2000, bills for local phone service must be presented so that customers can understand the reason for all charges. Information on customer bills must be categorized into basic local service and related charges, optional services, and taxes. Beginning March 1, 2000, companies may not cut off basic local service due to unpaid long-distance bills, but access to long-distance service may be blocked.

Supporters said SB 560 would be another step toward competition in Texas' local telephone service market while protecting consumers and ensuring more and better customer service. SB 560 would establish as state policy that all customers, including rural and low-income customers, have access to reasonably priced telecommunications and information services, including cable, wireless, and advanced services.

SB 560 would save consumers money by capping incumbent companies' rates on most local services until 2005, reducing long-distance access rates, and requiring the rate reduction to flow to the customer. Of the total 12-cent-per-minute rate charged, the actual cost of providing access is about 1 cent, while 11 cents goes to subsidize rural phone service, keep residential rates low, and add profits for local phone companies. Continuing

such subsidies is unfair to long-distance companies. The mandatory rate reductions in SB 560, coupled with PUC-ordered reductions reimbursed by the USF, would equal about 5.5 cents. That would lower access rates to about 6 cents per minute.

SB 560 would give competing local companies the flexibility they need to offer attractive prices and packages of services. The bill would ensure that customers both of competing companies and incumbents could realize the same pricing and promotional savings, while preventing former monopoly companies from engaging in predatory pricing, discounting, or any other anticompetitive practice.

Opponents said that while SWB and GTE would have to reduce long-distance access rates that are used to benefit all customers through subsidies, the bill would not ensure that all customers ultimately would benefit from the rate reductions. Furthermore, fewer than half of SWB's residential customers make in-state long-distance calls, meaning that benefits would not go to the vast majority of customers.

SB 560 would deregulate services such as caller ID and other custom calling features before competition had gained a foothold in the Texas market and customers had a real opportunity to choose among alternate providers. SWB has 98 percent of the local residential market and between 85 percent and 95 percent of the business market. SB 560 would remove much of the PUC's authority to prevent anticompetitive behavior and would not provide enough time for the commission to review proposed rates. All forms of pricing flexibility should be delayed until 40 percent of customers have switched from incumbents to new competitor companies.

SWB and GTE could begin to offer their services through affiliates in the same territories they now serve. Although an affiliate would be called a "competitive local exchange company," it would have all the benefits of the incumbent and many opportunities to use this close relationship to ensure that a true competitor could not compete.

Other opponents said the long-distance rate reductions would not go far enough, as the true cost of access is only 1 cent. Also, the 40 percent customer transfer provision is unrealistic. The bill would allow competitors to "cherry-pick" the high-revenue customers, leaving incumbents as the providers of last resort for the remaining customers. Once those customers were gone, the subsidy for residential local service would disappear as well.

The **HRO analysis** appeared in Part One of the May 24 *Daily Floor Report*.

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